A/69/40 (Vol. II, Part One)

United Nations

Report of the Human Rights Committee

Volume II (Part One)

108th session
(8–26 July 2013)

109th session
(14 October–1 November 2013)

110th session
(10–28 March 2014)

General Assembly
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Sixty-ninth session
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United Nations • New York, 2014

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A. Communication No. 1405/2005, *Pustovoit v. Ukraine* (Views adopted on 26 March 2014, 110th session)[*]

Submitted by:	Mikhail Pustovoit (not represented by counsel)
Alleged victim:	The author
State party:	Ukraine
Date of communication:	21 April 2005 (initial submission)
Subject matter:	Life imprisonment after unfair trial
Procedural issue:	Substantiation of claims; examination by another international body
Substantive issue:	Equality before the law; torture, cruel, inhuman or degrading treatment or punishment; defence rights; right to examine witnesses; right not to be compelled to confess guilt; freedom to seek, receive and impart information
Articles of the Covenant:	2 (1); 4 (2); 7; 10 (1) and (2); 14 (1), (2) and (3) (b), (d), (e) and (g); and 19 (2)
Articles of the Optional Protocol:	2 and 5 (2) (a)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 20 March 2014,

Having concluded its consideration of communication No. 1405/2005, submitted to the Human Rights Committee by Mikhail Pustovoit under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

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[*] The following members of the Committee participated in the examination of the present communication: Mr. Yadh Ben Achour, Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Ms. Zonke Zanele Majodina, Mr. Gerald L. Neuman, Sir Nigel Rodley, Mr. Victor Manuel Rodríguez-Rescia, Mr. Fabián Omar Salvioli, Ms. Anja Seibert-Fohr, Mr. Yuval Shany, Mr. Konstantine Vardzelashvili, Ms. Margo Waterval and Mr. Andrei Paul Zlătescu.

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Mikhail Pustovoit, a Ukrainian national born in 1977 serving a life sentence in Ukraine. He claims to be the victim of a violation by Ukraine of his rights under articles 2 (1); 4 (2); 7; 10; 14 (1), (2), and (3) (b), (d), (e) and (g); and 19 (2), of the International Covenant on Civil and Political Rights. The Optional Protocol entered into force for the State party on 25 October 1991. The author is unrepresented.

Factual background

2.1 On 13 May 2000, two young women, E.G. and O.P., were murdered in E.G.'s apartment. The author and another man, I.Y., were in the apartment when the murders took place, while one Mr. S.P. remained outside. The author denies involvement in the murder and explains that I.Y. ordered him to take a handbag from the crime scene; he took the handbag and burnt it at his home. He did not report the murders, as I.Y. had threatened to kill him.

2.2 On 15 May 2000, the author was arrested on suspicion of murder. Police officers tortured and battered him to extract a confession. The Head of the Criminal Investigation Unit of the Izyaslav Department of the Interior ("the Head of Unit") participated in the ill-treatment, which was witnessed by the co-accused S.P.

2.3 On 8 May 2001, Khmelnitsk Regional Court ("the Regional Court") found the author guilty of theft or damage of documents, stamps and seals (article 193, part 1, of the Criminal Code), banditry (article 142, part 3) and premeditated murder under aggravating circumstances (article 93 (a), (d), (f) and (j)) and sentenced him to life imprisonment with property seizure. According to the ruling, the court rejected the claims of the author and S.P. regarding the use of unlawful methods of investigation, for lack of evidence. It referred to a video recording on which the author calmly, consecutively and in detail related the crime events, and to his testimony that he held E.G. while I.Y. was stabbing her.

2.4 The author claims his innocence, and states that his fingerprints were not found at the crime scene and that the pre-trial investigation established no evidence showing his guilt. He claims that his conviction was based on assumptions and refers to the conclusion by an expert that O.P. was stabbed by a left-handed person. When, as a right-handed person, he requested the court to order another examination by a different expert, the first expert's conclusions were removed from the case file. Furthermore, the judge of the Regional Court rejected his complaints about torture during the pre-trial investigation. In court, the Head of Unit denied that he was present during the author's interrogations, despite a video recording proving the contrary, which was viewed by the court. The investigator from the Prosecutor's Office claimed that officers of the Criminal Investigation Unit were present for security reasons during the investigation. The forensic medical expert, who had examined the author in the presence of the police officers who had tortured him, stated that his body showed no marks of beatings. The author requested a new examination and showed his injuries (strained wrists, dislocated vertebrae and missing teeth) to the court. However, the court was satisfied with what the author describes as a "forged" certificate presented by the prosecutor, stating that the author had not requested the assistance of the medical unit of Khmelnitsk Pre-Trial Detention Centre No. 29 (the "SIZO").

2.5 On 8 May 2001, after being convicted by the Regional Court, the author was transferred to a SIZO detention centre.[1] He was kept in a cell designed for one person until 13 December 2001, but sometimes up to three persons were detained there. The cell was cold, damp and poorly lit, and had no regular water supply, strong draughts and a wet concrete floor. The radio did not work. Once a week he was given a few minutes in a bathroom with barely dripping water to shave and wash. Regardless of the weather conditions, he was forced to go outside to the courtyard.

2.6 On 9 May 2001, he was beaten in the corridor, as a "preventive measure", on the orders of the Chief Security Officer. On 14 May 2001, he complained of psychological pressure and physical hardship, and of the poor detention conditions, to a monitoring prosecutor visiting the SIZO. The prosecutor replied that all complaints regarding conditions of detention should be submitted to the Head of the SIZO first. At a later point, the author was denied dental services, except once when his tooth was extracted. He lost 14 teeth, which were damaged because of the torture and beatings by police officers, during the pre-trial investigation, and in the SIZO. He is unable to properly digest food and suffers from a chronic gastrointestinal illness.

2.7 When the author was acquainting himself with the Regional Court's trial transcript, his hands were handcuffed, preventing him from taking notes. The authorities disregarded his complaints that the transcript was not bound, that pages were unnumbered or missing, and that it had been drafted to match the indictment. His request to study the criminal case file to prepare his defence in the appeal court was missing. He was informed orally that the law did not provide for such a possibility.

2.8 On an unspecified date, he requested to be personally present during the examination, by the Regional Court, of his comments on the trial transcript. On 19 September 2001, he was informed that the court hearing in question had taken place on 17 September 2001.[2]

2.9 On an unspecified date, he was brought to the Supreme Court for the examination of his appeal. He was blindfolded with a hood and his hands were kept continuously handcuffed behind his back. The handcuffs were removed in the Kiev Pre-Trial Detention Centre.

2.10 On 27 November 2001, the Supreme Court dismissed the author's appeal against his conviction. As transpires from the ruling, in his appeal the author submitted that he had been forced to confess guilt as a result of unlawful methods of investigation and that both victims had been murdered by I.Y. He further argued that from the outset of the investigation, all three co-accused were represented by the same lawyer, despite a clear conflict of interest as well as obvious contradictions in their testimonies. He also complained in his appeal that he had been subjected to unlawful methods of investigation and, hence, had been forced to confess to the murder.

2.11 According to the ruling, however, the Supreme Court established that the author's claims about the use of I.Y.'s slanderous testimony as a basis for his conviction were unfounded, since this testimony was corroborated by testimony from other convicts, victims and witnesses, the contents of the crime scene examination report and experts' conclusions. The Supreme Court held that when the co-accused started giving contradictory testimonies, the author had immediately been assigned another lawyer, as of 22 June 2000. It also concluded that the author's and I.Y.'s claims about the use of unlawful methods of investigation to confess guilt had been examined but dismissed as unsubstantiated.

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[1] He was detained there between 23 May 2000 and 12 September 2005.

[2] The notification, dated 12 September 2001, states that on 17 September 2001, the Regional Court will examine the comments made by S.P. and I.Y. on the trial transcript. The author provided no copy of his comments on the transcript, or of his request to be present during their examination in court.

2.12 The author claims that he complained orally to the court about ill-treatment by law enforcement officers and states that he was unable to complain in writing, as he remained handcuffed, inside a secure metal cage, when the Supreme Court examined his appeal.

2.13 When he returned to the SIZO on 13 December 2001, the conditions of detention of those sentenced to life imprisonment became unbearable. Despite his special status as a former officer of the State Department of Ukraine for the Execution of Sentences,[3] he was detained as a common criminal. As such, he shared a cell with two other inmates, some of whom had numerous convictions, were in transit to or from other penitentiaries, or were suffering from tuberculosis. He was often transferred to cells that had previously been occupied by inmates infected with tuberculosis.

2.14 On an unspecified date, the author asked the SIZO's Deputy Head for Social Matters to explain why his complaints about his unjust conviction and the inhumane conditions of his detention had not been dispatched to the Prosecutor's Office and the courts. Two days later, he and other inmates were battered by masked men. This happened shortly after the visit to the SIZO of two high-ranking officers of the State Department for the Execution of Sentences (Khmelnitsk region), who apparently despised the author from the time of his service there. Thereafter, all mass beatings of convicts in the SIZO were held with the participation of the Special Rapid Response Unit of the State Department for the Execution of Sentences and troops of the Ministry of the Interior, in the presence of the aforementioned persons and the SIZO administration. The author was also beaten individually in the presence of SIZO officials.

2.15 Starting from September 2003, the quality of the food deteriorated and the author was not allowed to get off his plank bed between 10 p.m. and 6 a.m., even to relieve himself. SIZO staff could view the toilet through a peephole and prisoners had to relieve themselves in front of their cellmates. Starting from May 2003, the author and the life prisoners were forbidden from purchasing essential goods in the SIZO shop.

2.16 On 24 June 2004, the author and his cellmate were severely beaten by masked men, in their cell and in the courtyard. There were traces of blood in the courtyard from other life prisoners beaten on the same day. The author was kicked in the face, hit with truncheons on his kidneys and back, and hit on the thorax. He sought medical assistance, but the Chief Security Officer replied that the beatings of the inmates sentenced to life imprisonment would be repeated in a week. Unable to withstand another round of beatings, one of the inmates hanged himself on 1 July 2004, during the night. In order to cover up the beatings, the administration forced inmates to write retractions and affidavits to the effect that they had never suffered any ill-treatment. Fearing for his life and health, the author wrote a similar affidavit.

The complaint

3.1 The author claims that his handcuffing and placement in a metal cage during the examination of his appeal by the Supreme Court violated his rights under articles 7 and 14 (1) and (3) (b) and (d), of the Covenant. He also claims that the conditions of his transportation to the Supreme Court breached article 7 of the Covenant.

3.2 He claims a violation of his rights under articles 7 and 14 (3) (g) of the Covenant, as he was beaten and tortured by officials during the pre-trial investigation to force him to confess guilt. He claims a violation of article 7 of the Covenant as he was beaten, by officials, in detention, and on account of the conditions of detention in the SIZO, which raises issues under article 10 of Covenant. He further claims a violation of article 10 (1) and (2) of the Covenant, regarding the conditions of detention in the GVK-96 penitentiary colony.

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[3] From 1998 to 2000, the author was a junior inspector at Zamkovoy Special Regime Colony No. 58 in the Khmelnitsk region.

3.3 He claims that his conviction and sentence were incorrect and contrary to articles 2 (1), 4 (2) and 19 (2) of the Covenant. His conviction was based on assumptions and on I.Y.'s incriminating testimony at the pre-trial investigation, despite I.Y. retracting it before both the Regional Court and the Supreme Court.[4] These complaints appear to raise issues under article 14 (1) and (3) (g) of the Covenant.

3.4 He claims a violation of article 14 (3) (b) and (e) of the Covenant, as the court rejected his request to have certain witnesses questioned and for experts to carry out additional examinations.

3.5 The author also claims a violation of his rights of defence, which raises issues under article 14 (3) (b) and (d) of the Covenant, as he was handcuffed when acquainting himself with the trial transcript, as his request to familiarize himself with the criminal case file before the appeal hearing was ignored, and as his ex officio lawyer was ineffective and was present only when investigative actions were video-recorded; in addition, the author never met with him privately but only in the presence of the investigator during the pre-trial investigation or during the trial. The lawyer took away the only copy of the author's indictment act and disregarded his complaints.

3.6 He claims a violation under article 19 (2) of the Covenant, as prior to his conviction, a number of newspapers' reports designated him as a murderer, which raises issues under article 14 (2) of the Covenant.

3.7 He also claims a violation of article 2 (3) (a) of the Covenant, without further explanation.

State party's observations on admissibility and on the merits

4.1 In its notes verbales of 27 December 2005 and 28 April 2006, the State party submitted its observations on the admissibility and merits and adduced documents related to the case. Preliminarily, it notes that the fact that it does not deal with every single claim raised by the author does not imply that these claims are admitted.

4.2 The State party maintains that the communication is inadmissible under article 5 (2) (a) of the Optional Protocol, because on 24 December 2004, the author applied to the European Court of Human Rights, and his case was registered on 11 April 2005.

4.3 On the merits, the State party submits that article 2 (1) of the Covenant is of a general nature, and that its violation is preconditioned upon the finding of a violation of substantive rights under the Covenant. As to the claim under article 2 (3) (a), it argues that the author had an effective remedy at his disposal and effectively availed himself thereof by filing about 40 complaints and applications to various domestic authorities. The availability of an effective remedy does not necessarily imply a positive outcome for claimants.

4.4 As to the alleged violation of article 4 (2) of the Covenant, the State party maintains that the author submits no explanation in support. It assumes, therefore, that his allegations are linked with those made under article 7. Hence, the State party submits that the author failed to provide any evidence, especially medical, to support his allegations of beatings.

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[4] There is no document on file to support the claim that I.Y. retracted his earlier testimony. On the contrary, it appears from the Regional Court's judgement that I.Y. testified against the author.

On 8 May 2001, the Regional Court examined complaints by his co-accused regarding their alleged beatings during the pre-trial investigation and concluded that "no substantiation thereof was established". The State party argues, therefore, that for the burden of proof to be shifted to the State party, the author should first substantiate sufficiently his allegations. In the absence of any substantiation by the author whatsoever, this part of the complaint is unfounded.[5]

4.5 Regarding the author's conditions of detention, the State party submits a number of affidavits whereby three SIZO inmates[6] and officials[7] qualify as satisfactory the general conditions of detention. Regarding the author's detention with ordinary criminals, despite his special status, it notes that on 8 July 2001 the author had requested the SIZO administration to "place anybody else" with him, and that prolonged solitary confinement may amount to a violation of article 7 of the Covenant.[8] This claim is therefore unfounded.

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[5] It appears from the documents submitted by the State party that after the author's case was registered, an internal investigation was initiated into his allegations of ill-treatment by the police officers to force him to confess. On 5 and 10 September 2005, the Ministry of the Interior and a Deputy Prosecutor General reported that the allegations had been examined by the Supreme Court and refuted as unfounded. The Deputy Prosecutor General submitted that the Court had viewed a recording on which the author calmly, consecutively and in detail related the crime events. The author's claim had been rebutted by testimonies by an investigator from the District Prosecutor's Office and by the head of the Criminal Investigation Unit, and by experts' conclusions. The author had sent 33 complaints from the SIZO but had never complained of beatings or humiliation. On 10 September 2005, the State Department for the Execution of Sentences stated that throughout his detention in the SIZO, the author had not been subjected to pressure, psychologically or physically. On 28 September 2005, the Khmelnitsk Regional Department of Security Services submitted that former officers of the Izyaslav Department of the Interior, including its Head of Unit, A., had participated in investigating the crime. They had testified that the author's co-accused had pleaded guilty when interrogated and had claimed his involvement in the crime. The officers had denied having used pressure against the co-accused, either psychologically or physically. Due to the destruction of files at the central district hospital, it was impossible to establish whether medical assistance had been provided to the detainees during the pre-trial investigation. The District Prosecutor's Office had received no complaints of unlawful actions by police officers between September 2000 and September 2005. On 5 October 2005, the Ministry of the Interior reported that the author had not complained of ill-treatment to the law enforcement authorities and that his allegations could not be confirmed.

[6] Three inmates, who shared a cell with the author in 2002 and 2003, submit that cells were heated in winter, that the water supply was regular, and that the SIZO administration used no force or degrading treatment towards the detainees, in particular the author or those sentenced to life imprisonment. Inmate Z. states that the author did not complain about the conditions of detention. The statements are handwritten and are signed by the inmates.

[7] On 2 September 2005, a deputy head of the SIZO reported that during his incumbency, no instructions were given to forbid purchases from the SIZO shop by SIZO detainees. On the same date, the SIZO medical unit stated that the cells were disinfected daily. Furthermore, an ad interim head of the SIZO stated that the detainees took a shower and had their linen cleaned weekly, they were regularly provided with drinking water, their cells were lit by 75–100 watt bulbs and were heated to 18°C minimum. On 10 September 2005, the State Department on the Execution of Sentences reported that the cells where the author was detained contained the necessary number of berths, were adequately lit, and were equipped with washbasins and toilets, separated by a partition; that windows ensured adequate ventilation; and that the conditions of detention complied with sanitary and hygiene standards. The author and those sentenced to life imprisonment were provided with bedding and food, as required, and they were afforded a one-hour period of outdoor exercise and an uninterrupted eight-hour sleep, daily. Throughout his detention in the SIZO, the author was not placed in solitary confinement, nor was he subjected to pressure either psychologically or physically. His health condition was satisfactory, which is confirmed by medical documents. On 11 November 2003, he sought and obtained dental care. He had not been detained with inmates with tuberculosis. He did not complain of the conditions of his detention to the courts. On 10 September 2005, a Deputy Prosecutor General confirmed that the conditions of detention complied with the relevant standards and that the author had not been held together with inmates with tuberculosis. Furthermore, the author had submitted 33 complaints, including with regard to the conditions of his pre-trial detention, and his complaints had been examined.

4.6 The State party adds that the author's allegations regarding his handcuffing and blindfolding during his transportation to the Supreme Court are groundless. Even if they had been proven, the State party notes that such measures may be applied as precautionary measures not intended to humiliate or debase. The Law on Police allows the handcuffing of detainees while they are being escorted, if there are grounds to believe that they could escape or inflict injuries on themselves or others. Section 25 of the Order of the State Department for the Execution of Sentences on the Adoption of the Penitentiary Routine Rules ("the Order") provides that life prisoners shall be handcuffed every time that they are escorted.

4.7 The State party adds that although blindfolding is not provided for under domestic law, it may be applied exceptionally in cases where the life or health of the blindfolded person is endangered. Blindfolding is subject to authorization, which was not sought in the present case. With reference to case law of the European Court of Human Rights,[9] the State party submits that nothing shows that the blindfolding alleged by the author to have been carried out had caused him injuries or physical or mental suffering.

4.8 As regards the author's access to medical treatment, the State party provides a copy of his SIZO medical file, which describes his examinations by a doctor and the medical assistance provided.[10] According to the medical file, no bruises or other injuries were found on the author's body, contrary to his allegations of systematic beatings. The State party also appends a medical certificate issued by the SIZO medical unit on 2 September 2005 showing that throughout the author's detention there (i.e. between 23 May 2000 and 12 September 2005) he requested no medical assistance on account of bodily injuries.

4.9 Regarding the author's allegations under article 14 of the Covenant, the State party argues that he himself freely admitted that he was in the apartment when the murders took place, that he did not report the crime to the authorities, and that he took the handbag from the crime scene. These facts by themselves are sufficient to convict him of theft and concealing a crime. The State party further submits that the court thoroughly examined the contradictory testimonies of all the co-accused, ordered several forensic examinations, examined a number of witnesses, and decided to convict the author after reviewing all the evidence against him. Thus, the court examined the guilt of each of the co-accused individually and discarded I.Y.'s statement incriminating the author. This decision was upheld on appeal. The State party provides copies of nine letters, including covering letters attached to the author's submissions to the courts and the courts' replies thereto,[11] to refute his claim regarding his inability to study the case file and to appeal the judgement.

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[8] Reference is made to Committee's general comment No. 20 (1989) on the prohibition of torture or other cruel, inhuman or degrading treatment or punishment, para. 6, *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40* (A/47/40), annex VI, sect. A.

[9] *Ahmet Özkan and others v. Turkey* (judgement of 6 April 2004), application No. 21689/93, para. 338 referring, mutatis mutandis, to *Salman v. Turkey* (judgement of 27 June 2000), application No. 21986/93, para. 132; and *Öcalan v. Turkey* (judgement of 12 March 2003), application No. 46221/99, paras. 224 and 228.

[10] The medical file contains a copy of the author's blood test and several records indicating that he was seen 10 times by a psychiatrist and twice by a dentist, followed by a note saying "there are no complaints" and a diagnosis saying "mentally healthy; psychotherapeutic discussion conducted". According to an affidavit issued by the head of the SIZO medical unit, the author had his heart and chest X-rayed annually between 2000 and 2005 and these were diagnosed as normal.

4.10 Regarding the claim under article 19 (2) of the Covenant, the State party submits that under domestic law, the right of detainees or prisoners to "receive and impart information" is subject to certain limitations. For security reasons and to prevent information leaks or prison breakouts, the correspondence of detainees is reviewed (but not censored) by the authorities. Correspondence to the Parliamentary Human Rights Commissioner, the prosecutor and the European Court of Human Rights is not subject to review. The State party provides copies of covering letters of 19 complaints sent by the author from the SIZO and the copies of the replies received, as certified by his signature.

Author's additional submissions and comments on the State party's observations

5.1 On 15 and 25 January and 15 and 24 March 2006, the author submitted that the application to the European Court of Human Rights had been filed by his mother without his knowledge. On 6 February 2006, he asked the Court to withdraw his application. On 6 March 2006, the Court discontinued it.

5.2 On 23 February, 28 February, 24 March, 7 July and 12 July 2006, 7 January 2007 and 23 February 2009, the author submitted his comments on the State party's observations. He reiterates his initial claims and argues that in its observations, the State party merely referred to national law, without explaining how it applies in practice.

5.3 He emphasizes that the State party provided copies of the covering letters attached to his complaints to different authorities, but not his complaints or the replies received. Had it provided all those documents, they would have defeated its arguments on the availability of effective remedies. Furthermore, although the State party claims that he has filed about 40 complaints, he has filed at least twice as many. As he did not receive any reply to many of them, he believes that they never reached the addressees.

5.4 The author maintains that his rights under article 7, together with article 4 (2), of the Covenant have been violated. He submits that the State party has deliberately omitted to address his complaints regarding the forced confession and reiterates that he consistently raised this issue during the pre-trial investigation, in the Regional Court and the Supreme Court. Even if he has no medical evidence in support, he was effectively prevented from obtaining such evidence due to the refusal, by the State Department for the Execution of Sentences and the Prosecutor's Office, to order a medical examination.

5.5 He reiterates that he was beaten in the SIZO, both individually and in group beatings, by the Special Rapid Response Unit of the State Department for the Execution of Sentences. The group beatings took place monthly, from 2002 to 2004.

5.6 The author reiterates his claims about being handcuffed and blindfolded while being escorted to the Supreme Court, and adds that his head was covered by a hood on which there was the dried blood and saliva of those who had worn it before. He feared that he might contract tuberculosis or other diseases. The handcuffing during the examination of his appeal made him feel humiliated and debased. There was no reason for keeping him in a cage in the courtroom. He refutes the State party's argument that handcuffing is permitted under domestic law.[12]

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[11] The covering letters indicate that the author sought to study the trial transcript (10 May 2001), sent his initial appeal (14 May 2001) and two additional appeals (21 May and 16 July 2001), and requested to study the co-convicts' appeals (24 May and 20 July 2001). On 6 and 10 July 2001 the Regional Court granted him leave to study the case file, and on 20 August 2001 it granted him leave to study the co-convicts' appeals. On 29 July 2003, the author requested a copy of the trial transcript from the Regional Court. On 12 August 2003, the Regional Court informed him that domestic legislation does not provide for such a practice.

5.7 Furthermore, he was effectively prevented from exercising his right to defend himself, because with his hands handcuffed behind his back, he could not hold or turn over the pages of his additions to his appeal, which he intended to read out in the Supreme Court. The presiding judge rejected the author's request to take the additions and read them out on his behalf.[13]

5.8 The author refutes the State party's claim that he was provided with medical assistance and maintains that he was not examined by a competent doctor prior to his transfer to the Gorodishche colony (the "GVK-96 prison"). He had his lungs X-rayed in the SIZO after discovering that his inmate had tuberculosis. He argues that the State party provided fake medical certificates, as they do not bear his signature.

5.9 He does not deny that he was present at the crime scene on 13 May 2000, witnessed the murders and took the handbag from the apartment. Even if, according to the State party, this may amount to theft and the concealment of a crime, it cannot justify his conviction of murder.

5.10 The author submits that on 4 July 2006, the administration of the GVK-96 prison attempted to conduct a medical examination, allegedly at the request of the Human Rights Committee. However, when the head of the medical unit refused to document even the most obvious injuries sustained after the torture, such as several missing teeth and other injuries, the author declined to undergo the examination.

5.11 He questions the voluntary nature of the SIZO inmates' affidavits as submitted by the State party, and notes that the documents' similarity suggests that they were written under pressure.

5.12 He submits that he complained of unlawful actions by police officers on 9 February 2005 to the Minister of the Interior. Two of the three officers identified by him as torturers were in fact dismissed when they tortured a suspect to death in 2003 but Khmelnitsk Regional Prosecutor's Office covered up this incident, passing it off as a natural death; the third officer involved was dismissed for the same reason in 2002.

5.13 On an unspecified date, the author requested Izyaslav District Prosecutor's Office to institute criminal proceedings against the three aforementioned officers. On 19 October 2006, a deputy prosecutor rejected his request, because he had failed to make the same complaint during the pre-trial investigation and in court. On 3 November 2006, the author appealed this refusal to Izyaslav District Court and submitted evidence of torture by the police officers. On 30 December 2006, his appeal was rejected with reference to the Regional Court's judgement of 8 May 2001, according to which "allegations about having given a self-incriminating testimony due to allegedly unlawful methods of investigation could not be taken into account for lack of evidence". The author's appeal of 16 February 2007, to the Regional Court, against the ruling of 30 December 2006, was still pending.

5.14 Finally, the author complains that the current conditions of detention in the GVK-96 prison violate article 10 (1) and (2) of the Covenant. His "outdoor walks" take place in a suspended cage with no natural lighting. Due to his height, he cannot exercise inside the cage and has vertigo looking down from the cage. The prison cells are covered with mould, there is no regular water supply and he is not allowed to purchase a toilet lid. Every ten days, he is transferred to another cell previously occupied by inmates with tuberculosis and

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[12] He claims a violation of article 7 of the Covenant.

[13] He claims a violation of article 14 (1) and (3) (b) and (d) of the Covenant.

HIV/AIDS. He is not allowed to lie down during the day. While moving inside the penitentiary, inmates have to bend towards the floor with their hands handcuffed behind their back. Outside of the building, inmates are hooded.

Author's additional submission

6.1 In the Committee's letter of 21 July 2010, the author was invited to provide clarifications regarding his case. On 9 August and 13 September 2010, he explained that after his arrest on 15 May 2000, he was detained at the Izyaslav district police station for nine to ten days prior to his transfer to the SIZO. He was shifted between the SIZO and the police station every other week for the three years of the pre-trail investigation. Such shifts were aimed at putting him under pressure, both psychologically and physically.

6.2 He provides the names, military rank and position of three police officers employed at the district police station who battered him upon his arrest.

6.3 The author explains that he did not confess to the murder despite the torture. He challenges the accuracy of the summary of his appeal, in the Supreme Court's ruling, regarding the use of duress to confess, and explains that the Supreme Court distorted the wording of his appeal to plot a case against him, as did the police officers.[14]

6.4 He reiterates that S.P. witnessed his torture at the district police station.

6.5 He clarifies that he was first transferred to the SIZO nine to ten days after his arrest on 15 May 2000. He unsuccessfully requested the SIZO medical unit to record his torture marks. He still suffers from violent physical after-effects of the torture. After the prosecutor's visits to the SIZO, pressure was put on him, both psychologically and physically, which impaired his preparation for the hearings. Furthermore, the prosecutor instructed the SIZO staff to "demoralize" him.

6.6 The author recalls that after his conviction, he requested to study the trial transcript. He was given a pile of documents. Since he was handcuffed while studying the transcript, he could not take notes. Subsequently, he filed multiple complaints, to the Regional Court and the Prosecutor's Office, outlining missing information, such as the expert's conclusion that O.P. had been stabbed by a left-handed person. He also complained that SIZO officers had hindered his access to the transcript, by handcuffing him. No response followed, and he was not provided with a copy of the transcript.

6.7 The author explains that his reference to article 255 of the Code of Criminal Procedure in connection with his request to have access to the case file was due to his lack of legal knowledge. However, his request clearly indicated that he sought to study the case file.

6.8 He submits that his comments on the trial transcript have been concealed by the authorities. He raised this matter in his additional appeals. He asks the State party to clarify why his comments remain unanswered. His request to attend the court hearing of 17 September 2001, when the comments on the transcript were examined, disappeared. Furthermore, he was only informed of the hearing on 19 September 2001.[15]

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[14] The author explains that on the second day after his arrest, the officers asked him to sign unknown documents; when he refused, they beat him. Furthermore, they filmed the Head of Unit explaining to him how to show, on a mannequin, fractured neck vertebrae, while, in disagreement, he was pushing the mannequin away. As he did not confess guilt, he was tortured and carried to his cell thereafter, which was witnessed by inmates whose names he does not recall. When the videotape was shown in court, I.Y. testified that the author had broken O.P.'s neck. The author asked the court to use the record as evidence of torture and to initiate proceedings against the Head of Unit. In reply, the court questioned the Head of Unit. When the experts' conclusions showed that O.P.'s neck was not fractured, the investigator, in collusion with the police, plotted another indictment and the judge removed all mention of the record from the case file. The author claims that the removal of the videotape from the case file violates articles 7 and 14 (1) and (2) of the Covenant.

6.9 One evening at the beginning of November 2001, the author was escorted from the SIZO to the Supreme Court. The trip lasted over 24 hours, during which time he was handcuffed and, at times, hooded.[16]

6.10 A State-appointed lawyer represented him on appeal before the Supreme Court. The author complained before the investigator and the court that the lawyer was not interested in defending his interests.[17] However, as he could not afford to retain a lawyer privately, the State-appointed lawyer remained assigned to him. The author adds that the lawyer was a retired former colleague of the authorities.

6.11 He claims that during the examination of his appeal by the Supreme Court, he complained orally of his ill-treatment during the pre-trial investigation, in the SIZO and while being escorted to the court.[18]

6.12 He explains that the trial court judge ignored his requests to speak out, to ask questions and to record testimonies in favour of his innocence, and that I.Y. had incriminated him. The author wanted to secure the presence at court of I.Y.'s cellmates, to whom I.Y. had described the murder, and of those who had witnessed the after-effects of the torture on the author; he could not recall the witnesses' names.

6.13 The author claims that the Regional Court's decision of 8 May 2001 is plotted, as it does not reflect I.Y.'s withdrawal in court of his allegations, made during the pre-trial investigation, that the author had been implicated in the murder. Instead, the Regional Court based the author's conviction on I.Y.'s allegations.

6.14 He keeps no copy of the regional media publications identifying him as a murderer.

6.15 He has not brought separate proceedings regarding the publication and broadcast of the incriminating statements against him. However, he indicated in some of his additional appeals that such information had been published and broadcast.[19]

6.16 The author clarifies that the court's use of I.Y.'s initial testimony as a witness was inadmissible in terms of the commentary on article 68 of the Code of Criminal Procedure, under which anyone can be a witness in a criminal case, except parties to the proceedings interested in their outcome, such as victims, suspects, the accused or convicts.

6.17 The author invites the Committee to request the State party to provide information regarding the date of his transfer to the GVK-96 prison, his complaints about the conditions of detention there, the outcome of such complaints, and corroborating documents.

State party's additional comments

7.1 In the Committee's note verbale of 21 July 2010, the State party was requested to provide clarifications and supporting documents.

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[15] He claims that the facts in paragraphs 6.6 to 6.8 above violate articles 14 (1) and (2) of the Covenant. He claims a violation of article 14 (1) of the Covenant, as the authorities failed to notify him of his right to attend a court hearing of his case.

[16] He claims a violation of article 7 of the Covenant.

[17] He claims a violation of article 14 (3) (g) of the Covenant.

[18] He claims a violation of article 7 of the Covenant.

[19] He claims a violation of 14 (2) of the Covenant.

7.2 On 29 December 2010 and with reference to the author's further information of 13 September 2010, the State party provided comments made by its Supreme Court (undated) and Regional Court (dated 10 December 2010).

7.3 Regarding the alleged distortion of his appeal in the ruling of 27 November 2001, the Supreme Court submits that it dismissed the appeals by the author and his counsel; that the author's guilt was established by corroborating evidence; and that his acts were rightly qualified and his sentence was lawful. He attended the appeal hearing and had numerous opportunities to speak out and defend himself. The Supreme Court, therefore, examined the author's appeal in compliance with the applicable criminal procedure legislation and it has abided by the provisions of the Covenant.

7.4 The Regional Court explains that, as transpires from the trial transcript, after the pronouncement of the sentence, the presiding judge explained to the convicts, including the author, the appeal procedure, and their right to study the trial transcript and comment thereon. On 6, 9 and 10 July 2001, the author studied the trial transcript, which is confirmed by his signature; he made no comments. The comments made thereon by S.P. and I.Y. were duly examined by the court.

Issues and proceedings before the Committee

Consideration of admissibility

8.1 Before considering any claim contained in a communication, the Human Rights Committee must decide, in accordance with rule 93 of its rules of procedure, whether or not it is admissible under the Optional Protocol to the Covenant.

8.2 The State party has submitted that the Committee is barred from considering the present communication, as an identical complaint has been filed with the European Court of Human Rights. The Committee notes, however, that the application in question was discontinued on 6 March 2006 at the author's request. In these circumstances, the Committee is not precluded by article 5 (2) (a) of the Optional Protocol from examining the present communication.

8.3 Regarding the exhaustion of domestic remedies, the Committee has noted that according to the information submitted by the author in his initial submission, all available domestic remedies have been exhausted. In the absence of any pertinent information from the State party, the Committee considers that the requirements of article 5 (2) (b) of the Optional Protocol have been met.

8.4 The Committee notes that the author claims a violation of his rights under article 2 (3) (a) of the Covenant, without clarifying the nature of the violation of this provision. It observes that article 2 of the Covenant lays down general obligations for States parties, and, in principle, cannot, in isolation, give rise to a separate claim in a communication under the Optional Protocol.[20]

8.5 With regard to the author's allegations of a breach of article 4 (2), the Committee notes that the State party has not purported to rely on any derogation from provisions of the Covenant pursuant to article 4.[21] Accordingly, the Committee considers this part of the communication incompatible with the provisions of the Covenant, and therefore inadmissible under article 3 of the Optional Protocol.

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[20] See, for example, communication No. 316/1988, *C.E.A. v. Finland*, decision of 10 July 1991, para. 6.2; communication No. 802/1998, *Rogerson v. Australia*, Views adopted on 3 April 2002; and communication No. 1213/2003, *Sastre Rodríguez et al. v. Spain*, decision of 28 March 2007, para. 6.6.

[21] Communication No. 139/1983, *Hiber Conteris v. Uruguay*, Views adopted on 17 July 1985, para. 7.5.

8.6 The Committee notes the author's arguments in relation to article 7 that he was subjected to duress by police officers, to force him to confess guilt, and by the SIZO administration, to put pressure on him. The State party has rejected this claim, as no medical evidence was submitted by the author in support, and as the courts of two instances scrutinized the allegations of ill-treatment made by the author and his co-convicts and refuted them as unsubstantiated.

8.7 The Committee notes that, before his trial, the author was examined by a medical expert, who found no marks on his body consistent with beatings, and that the author has not challenged the fact that this examination took place. It also notes that both the Regional Court and the Supreme Court examined his allegation of duress and dismissed it for lack of evidence. The Committee notes that the material on file does not lead it to conclude that the determination made by the domestic courts was arbitrary or amounted to a denial of justice. Furthermore, it notes that the author's medical file does not show that he complained of the beatings inflicted upon arrest or in detention at any point during his detention in the SIZO between 23 May 2000 and 12 September 2005. In addition, he refused to undergo a medical examination on 4 July 2006, while claiming that the marks of the torture were visible. In addition, to the extent that he claims that the doctor refused to document his injuries, the Committee notes that there is no material before it to demonstrate that the author has challenged such a refusal before the domestic authorities or in court.

8.8 The Committee further takes note of the documents provided by the State party showing that following the transmittal of the author's complaints, an internal inquiry was conducted which confirmed the domestic courts' conclusions that the author had not been subjected to ill-treatment aimed at forcing a confession from him, and that he did not complain, from the SIZO, of ill-treatment or humiliation. It also notes, with reference to the documents provided by the author, that there is no evidence that he attempted to institute criminal proceedings in relation to this attempted forced confession during the pre-trial investigation. Likewise, he has provided no evidence that he brought his claim regarding ill-treatment during his detention in the SIZO to the attention of the domestic authorities. To the extent that he may be understood as complaining of his inability to submit such claims in writing, as he was handcuffed while his case was heard by the Supreme Court, the Committee notes that there is nothing in the material before it to conclude that the author was not able to file such complaints from the SIZO.

8.9 In the circumstances, and in light of the subsisting inconsistencies, and in the absence of any further evidence in support of the author's allegations of duress, under article 7 of the Covenant, the Committee considers that it cannot conclude that the author has sufficiently substantiated this claim for the purposes of admissibility, and therefore declares it inadmissible under article 2 of the Optional Protocol.

8.10 The Committee notes the author's claim that blindfolding him with a hood and handcuffing him during his transportation to the Supreme Court amounted to a violation of article 7 of the Covenant. The Committee also notes that the State party has denied the claim of blindfolding the author during the transportation; it also stated that such a measure may only be used in exceptional circumstances, for the purpose of the security of the individual transported, and is subject to authorization, which in this particular case was not requested. The Committee further notes that although in his subsequent submissions the author reiterated his claim, no additional information was provided in support. It also remains unclear whether the author took any action or brought any complaint to the attention of the domestic authorities or courts on this matter. The Committee further notes that the State party did not deny the allegation that it handcuffed the author during the transportation but that it referred to the national legislation providing that detainees may be handcuffed when being escorted in order to prevent escape or injury, and that life prisoners in particular shall be handcuffed every time that they are escorted. The Committee observes that the author has not provided specific information or arguments to explain why handcuffing him during the transportation in order to prevent his escape would constitute cruel, inhuman or degrading treatment within the meaning of article 7 of the Covenant. In light of this, the Committee cannot conclude that the author's claims regarding his treatment during transportation have been sufficiently substantiated, and therefore declares them inadmissible under article 2 of the Optional Protocol.

8.11 The Committee further notes the author's claims, which potentially raise issues under articles 14 (1) and (3) (b), (e) and (g) of the Covenant, that the courts based his conviction on assumptions, on contradictory evidence, particularly that of I.Y., and on evidence obtained under duress, and rejected his requests to obtain additional expert examination and the attendance and examination of witness. The Committee observes that these claims amount primarily to an evaluation of facts and evidence, and recalls its jurisprudence that it is generally for the relevant domestic courts to evaluate facts and evidence in a particular case, unless it can be ascertained that the evaluation was clearly arbitrary or amounted to a denial of justice.[22] It considers that the materials before it do not suggest that the courts acted arbitrarily in evaluating the facts and evidence in the author's case or that the proceedings were flawed and amounted to a denial of justice.

8.12 In particular, the Committee notes that in light of the contradictory submissions and the material on file, in the absence of a copy of the trial transcript, it remains unclear whether, in fact, the author confessed to the murder at any stage of the domestic proceedings. Even if he did testify against himself, the Committee notes that the courts had established his guilt on the basis of a multitude of corroborating evidence. It notes the State party's argument that his conviction was based on a thorough review, by the courts of two instances, of contradictory testimonies of the co-accused, who were examined individually, witnesses' statements, and the results of several forensic reports, and that the courts rejected I.Y.'s statement incriminating the author. It also notes, in reference to the Supreme Court's decision, that, when establishing the author's guilt, the Supreme Court took into consideration the testimonies of the victims' relatives and the records from the crime scene examination. Furthermore, the Committee observes that nothing demonstrates that the author sought to obtain the attendance and examination of other witnesses at any stage of the proceedings or that his requests to this effect were not entertained. In the circumstances, the Committee considers the claims under articles 14 (1) and (3) (b), (e) and (g) of the Covenant to be insufficiently substantiated and therefore inadmissible under article 2 of the Optional Protocol.

8.13 The Committee further notes the author's claims regarding a violation of his rights of defence because he was denied access to his criminal case file and because his ex officio lawyers were ineffective, which potentially raises issues under article 14 (3) (b) and (d) of the Covenant. The Committee notes that, as established by the Supreme Court, a new lawyer was appointed to the author on 22 June 2000, as soon as contradictions appeared in his and I.Y's testimonies. It further notes that nothing in the material before it shows that the author ever requested a change of lawyer at any point of the proceedings.

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[22] See, for example, communication No. 1834/2008, *A.P. v. Ukraine*, decision of inadmissibility of 23 July 2012, para. 8.12; communication No. 1212/2003, *Lanzarote Sánchez v. Spain*, decision of inadmissibility of 25 July 2006, para. 6.3; communication No. 1616/2007, *Manzano et al. v. Colombia*, decision of inadmissibility of 19 March 2010, para. 6.4; communication No. 1771/2008, *Gbondo Sama v. Germany*, decision of inadmissibility of 28 July 2009, para. 6.4; communication No. 1758/2008, *Jessop v. New Zealand*, Views adopted on 29 March 2011, para. 7.11; and communication No. 1532/2006, *Sedljar and Lavrov v. Estonia*, Views adopted on 29 March 2011, para. 7.3.

8.14 The Committee notes the State party's submission that the author studied the trial transcript on 6, 9 and 10 July 2001, as attested by his signature, and that he did not file comments thereon. With reference to the documents provided by the State party, it notes that he was granted leave to study the case file on 6 and 10 July 2001. It further notes, in light of the material before it, that the author's submission that his comments on the trial transcript were concealed by the authorities is not supported by evidence. It further notes that he never claimed in court that his right to be acquainted with his case file, to study the trial transcript or to defend himself had been violated. It also notes that he was represented by a lawyer in the Supreme Court, and that, with regard to the quality of the legal assistance, nothing demonstrates that he ever requested to have another lawyer appointed. Accordingly, the Committee considers the claims under article 14 (3) (b) and (d) of the Covenant insufficiently substantiated, and therefore declares them inadmissible under article 2 of the Optional Protocol.

8.15 The Committee notes the author's claim regarding the conditions of detention in the SIZO, which potentially raises issues under article 10 of the Covenant. It takes note of the State party's argumentation in this regard and the affidavits that it produced in support, including statements by the author's inmates, and the results of on-the-spot verifications in the SIZO by a number of different authorities showing that the conditions of detention there were in compliance with the existing hygiene and sanitary norms that applied throughout the State party's penitentiary system. The Committee notes the number as well as the detailed and consistent nature of these affidavits. In addition, in light of their content, the Committee sees no reason to cast doubt on their veracity.

8.16 Insofar as the author may be understood as complaining of sharing, at times, a cell with two other inmates, including some infected with tuberculosis, the Committee notes that it has not been disputed by the author that on 8 July 2001, he requested the SIZO administration to "place anybody else" with him. It also notes that the author has not specified when and for how long he shared a cell with inmates infected with tuberculosis. In addition, it takes note of a letter dated 10 September 2005 in which the State Department for the Execution of Sentences denied that the author had ever been held together with inmates infected with tuberculosis. Furthermore, the Committee notes that, according to the author's medical case file and records, provided by the State party, he had his chest X-rayed on an annual basis in the SIZO between 2000 and 2005 and his lungs were not affected whatsoever. It notes that the author's mere allegation that these affidavits were false is not supported by any further explanations or documentary evidence.

8.17 Regarding the author's implicit claims of having been kept in solitary confinement, the Committee reiterates its general comment No. 20, under which prolonged solitary confinement of the detained or imprisoned person may amount to acts prohibited by article 7 of the Covenant.[23] It notes, however, that the author has not specified when exactly, and for how long, he was held in solitary confinement. Similarly, the author has not provided sufficient information as to the alleged violation of his rights as a former penitentiary official by being held at times together with ordinary criminals.

8.18 The Committee further notes the author's allegations, under article 10 (1) and (2) of the Covenant, regarding his conditions of detention in the GVK-96 penitentiary colony. It notes that the State party has not refuted these claims specifically. It also notes that the author, however, has not provided any explanations as to the claims he submitted in this regard with the competent domestic authorities, including with the courts, but instead asked the Committee to invite the State party to provide it with information in this connection.

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[23] See general comment No. 20.

8.19 In these circumstances, and in light of the subsisting inconsistencies and contradictions, the Committee concludes that the claims under article 10 of the Covenant concerning the author's conditions of detention in the SIZO and the GVK-96 penitentiary colony are insufficiently substantiated for the purposes of admissibility, and are therefore inadmissible under article 2 of the Optional Protocol.

8.20 The Committee further notes the author's claim regarding the dissemination of incriminating materials in the media prior to the court's final verdict in his case, which potentially raises issues under article 14 (2) of the Covenant. Despite its specific enquiry made with the author, however, the Committee has not received any documentary evidence to support these claims. In the absence of any other information or clarifications on file in this connection, and particularly in the absence of any explanation as to how, in practice, the media coverage regarding the murder had negatively impacted on the author's rights, the Committee considers that this claim is insufficiently substantiated and therefore inadmissible under article 2 of the Optional Protocol.

8.21 The Committee has noted the author's remaining claims to the effect that his rights under articles 7 and 14 (1) and (3) (b) and (d) of the Covenant have been violated because, as his hands were handcuffed, he could not take notes while studying the trial transcript in the SIZO, and he could not read out or use his written additions to his cassation appeal in the Supreme Court. It also notes that the author was kept handcuffed in a metal cage in the courtroom during the examination of his appeal by the Supreme Court. The Committee notes that, in fact, these allegations raise issues under articles 7 and 14 (1) and 3 (b) of the Covenant. Given that these claims remained unaddressed by the State party in its observations, the Committee considers that due weight must be given to the author's allegations as far as they are sufficiently substantiated. Accordingly, it concludes that this part of the communication is admissible as raising issues under articles 7 and 14 (1) and (3) (b) of the Covenant and proceeds to its examination on the merits.

Consideration of the merits

9.1 The Human Rights Committee has considered the communication in light of all the information made available to it by the parties, as provided under article 5 (1) of the Optional Protocol.

9.2. The issues before the Committee are whether the author's handcuffing and placement in a metal cage during the examination of his appeal by the Supreme Court subjected him to degrading treatment, for the purposes of article 7 of the Covenant, and violated his right to a fair trial free from prejudice, as provided for under article 14 (1) of the Covenant, and whether the handcuffing while he studied the trial transcript in the SIZO and during the examination of his appeal by the Supreme Court resulted in a violation of his right to be provided with the necessary facilities for the preparation of his defence, as guaranteed by article 14 (3) (b) of the Covenant. The Committee recalls that the prohibition in article 7 is complemented by the positive requirements of article 10 (1) of the Covenant, which stipulate that "all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."[24] It also recalls its general comment No. 21, which places on the State party a positive obligation to guarantee the human dignity of all persons deprived of their liberty and to ensure that they "enjoy all the rights set forth in the Covenant, subject to the restrictions that are unavoidable in a closed environment."[25] In addition, the Committee recalls its general comment No. 32, according to which "it is a duty for all public authorities to refrain from prejudging the outcome of a trial […] Defendants should normally not be shackled or kept in cages during trials or otherwise presented to the court in a manner indicating that they may be dangerous criminals",[26] as this may result in a violation of article 14 (1). The Committee further notes that article 14 (3) (b) of the Covenant contains important elements designed to guarantee the principles of a fair trial, including the right of the accused to access and use the documents that are necessary for the preparation of the defence.

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[24] General comment No. 20, para. 2.

9.3 The Committee notes that the State party has not specifically addressed these allegations and has failed to demonstrate that the measures imposed on the author were consistent with articles 7, 14 (1) and 14 (3) (b) of the Covenant. In particular, it failed to demonstrate that placing the author in a metal cage during the public trial at the Supreme Court, with his hands handcuffed behind his back, was necessary for the purpose of security or the administration of justice,[27] and that no alternative arrangements could have been made consistent with the human dignity of the author and with the need to avoid presenting him to the court in a manner indicating that he was a dangerous criminal. The State party also failed to demonstrate that handcuffing the author while he was studying the trial transcript or during the examination of his appeal by the Supreme Court was consistent with his right to have adequate facilities for the preparation of his defence. Accordingly, and in the absence of other pertinent information on file, the Committee concludes that the facts as presented reveal a violation of the author's rights under article 7 of the Covenant, on account of the degrading treatment inflicted on him during the trial; a violation of his rights under article 14 (3) (b) of the Covenant, on account of the interference with the preparation of his defence; and a violation of his rights under article 7 in conjunction with article 14 (1) of the Covenant, on account of the degrading treatment which affected the fairness of his trial.

10. The Human Rights Committee, acting under article 5 (4) of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the State party has violated the author's rights under articles 7 and 14 (3) (b), and article 7 together with article 14 (1) of the Covenant.

11. In accordance with article 2 (3) (a) of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including compensation, and to introduce the necessary modifications to its laws and practice so as to prevent similar violations from occurring in the future.

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[25] General comment No. 21 (1992) on humane treatment of persons deprived of their liberty, para. 3, *Official Records of the General Assembly, Forty-seventh session, Supplement No. 40* (A/47/40), annex VI, sect. B.

[26] General comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, para. 30, *Official Records of the General Assembly, Sixty-second Session, Supplement No. 40*, vol. I (A/62/40 (Vol. I)), annex VI; and communication No. 2120/2011, *Kovaleva and Kozyar v. Belarus*, Views adopted on 29 October 2012, para. 11.4.

[27] According to principle 1 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (1988), all persons under any form of detention or imprisonment shall be treated in a humane manner and with respect for the inherent dignity of the human person. Furthermore, under principle 36, paragraph 2, of the Body of Principles, the arrest or detention of such a person pending investigation and trial shall be carried out only for the purposes of the administration of justice on grounds and under conditions and procedures specified by law. The imposition of restrictions upon such a person which are not strictly required for the purpose of the detention or to prevent hindrance to the process of investigation or the administration of justice, or for the maintenance of security and good order in the place of detention shall be forbidden.

12. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether or not there has been a violation of the Covenant, and that pursuant to article 2 of the Covenant, the State party has undertaken to ensure for all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when a violation has been established, the Committee wishes to receive from the State party, within 180 days, information concerning the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views and to have them translated into Ukrainian and widely disseminated in Ukrainian and Russian in the State party.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

B. Communication No. 1592/2007, *Pichugina v. Belarus* (Views adopted on 17 July 2013, 108th session)[*]

Submitted by:	Olga Pichugina (represented by counsel, Roman Kisliak)
Alleged victim	The author
State party:	Belarus
Date of communication:	20 July 2007 (initial submission)
Subject matter:	Habeas corpus; unfair trial
Procedural issue:	Exhaustion of domestic remedies; level of substantiation of a claim
Substantive issue:	Right to be brought promptly before a judge; unfair trial
Articles of the Covenant:	2; 9, paragraph 3; and 14, paragraph 1
Article of the Optional Protocol:	2; 5, paragraph 2 (b)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 17 July 2013,

Having concluded its consideration of communication No. 1592/2007, submitted to the Human Rights Committee by Olga Pichugina under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author is Olga Pichugina, a Polish national born in 1962. She claims to be a victim of violations by Belarus of her rights under articles 2; 9, paragraph 3; and 14, paragraph 1, of the International Covenant on Civil and Political Rights.[1] The author is represented by counsel.

The facts as presented by the author

2.1 On 20 April 2002, the author was travelling by train from Moscow to Warsaw. At 6.30 a.m. her train stopped in Brest, Belarus, where she was arrested on suspicion of having committed a crime under article 228 of the Criminal Code (smuggling of a restricted currency in a large amount), and was placed in the investigation detention facility of the Internal Security Department of the Brest Region. On 22 April 2002, an investigator of the Committee of State Security issued an order to have the author kept in custody, which was sanctioned by the Brest Regional Prosecutor's Office in conformity with article 119, paragraph 2, and article 126, paragraph 4, of the Criminal Procedure Code. On the same date, she was brought to the investigation detention facility of the Directorate of the Committee of State Security, and then, shortly thereafter, to the investigation detention facility SIZO No. 7 in Brest. She remained in custody until 30 April 2002, when she was released. During her 10 days of detention, the author was not brought before a judge, as required by article 9, paragraph 3, of the Covenant.

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[*] The following members of the Committee participated in the examination of the present communication: Mr. Yadh Ben Achour, Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, Mr. Cornelis Flinterman, Ms. Zonke Zanele Majodina, Mr. Kheshoe Parsad Matadeen, Mr. Gerald L. Neuman, Sir Nigel Rodley, Mr. Victor Manuel Rodríguez-Rescia, Mr. Fabián Omar Salvioli, Ms. Anja Seibert-Fohr, Mr. Yuval Shany, Mr. Konstantine Vardzelashvili and Ms. Margo Waterval.

[1] The Optional Protocol entered into force for the State party on 30 December 1992.

2.2 At the time, the author did not take any legal steps to challenge the failure of Belarusian authorities to bring her before a judge. She claims that the Criminal Procedure Code of Belarus does not recognize any right that is analogous to article 9, paragraph 3, of the Covenant. At the same time, however, article 1, paragraph 4, of the Criminal Procedure Code provides that "International treaties of the Republic of Belarus that define rights and freedoms of individuals and citizens shall apply in criminal proceedings along with the present Code".

2.3 On 26 April 2007, i.e. five years after the events described above, the author complained both to the Head and the Chief of the Directorate of the Committee of State Security about the failure of the relevant authorities to bring her promptly before a judge, in accordance with article 9, paragraph 3, of the Covenant. On 14 May 2007, she received a response from both officials, dated 4 May and 5 May 2007, respectively, stating that there had been no violation of her rights under article 9, paragraph 3, that the decision of the Committee's investigator had been taken in conformity with the Belarusian law in force and that she had not exercised her right to appeal before a court the decision to detain her in accordance with article 144 of the Criminal Procedure Code. In addition, the Chief of the Committee's Directorate pointed out that the legislation in force at the time did not prescribe that anyone arrested or detained on a criminal charge be brought promptly before a judge.

2.4 On 26 April 2007, the author also complained about the Brest customs officers' failure to act, invoking article 9, paragraph 3, of the Covenant, to the Chairman of the Belarus State Customs Committee and to the Head of the Brest Customs. On 11 May 2007, she received a reply from the Deputy Chairman of the Belarus State Customs Committee, informing her that her detention had been carried out in conformity with the Belarus law in force. On 11 May 2007, she received a letter dated 5 May 2007, from the Head of the Brest Customs, who also did not find any grounds to consider that the actions of the Brest Customs, i.e., not bringing her promptly before a judge, had been unlawful.

2.5 The author states that she had no right to appeal the above decisions, because under article 138 of the Criminal Procedure Code, it is only "actions and decisions" of State organs that can be appealed, whereas "omission to act" cannot be appealed. In other words, there was no positive action taken by a government official against which an appeal could be lodged. As to the fact that she had not exercised her right to appeal to a court the decision to detain her, the author submits that, in her view, a right of appeal refers to article 9, paragraph 4, of the Covenant, and not to article 9, paragraph 3.

2.6 On 25 May 2007, the author invited the Leninsky District Court to open a civil case about the failure of the authorities to have her brought promptly before a judge. On 31 May 2007, the Leninsky District Court rejected her request explaining that her claims "were related to the actions carried out by investigation and inquiry bodies in the framework of criminal proceedings. These actions should be appealed to court according to the procedure stipulated in Chapter 16 (articles 138–147) of the Criminal Procedure Code, and, therefore cannot be appealed within the civil proceedings as stipulated in article 353 of the Civil Procedure Code, as the law prescribes another procedure for its appeal." The author claims that the exception to the right to appeal unlawful actions of State authorities established by article 353 of the Civil Procedure Code applies only when the Belarus law "establishes another, non-judicial, procedure for the consideration of particular complaints". The procedure stipulated in Chapter 16 of the Criminal Procedure Code, referred to by the Leninsky District Court, does not fall within the above category. Moreover, under paragraph 1, part 2, of the Ruling No. 10 of the Plenary of the Belarus Supreme Court of 10 December 2002, "under article 60 of the Belarus Constitution, an appeal according to non-judicial procedure of the State bodies' actions (omission to act), stipulated in article 353 of the Civil Procedure Code, does not deprive citizens from applying to court when they disagree with the adopted decision". On 15 June 2007, the author appealed the decision of the Leninsky District Court to the Brest Regional Court on the above-mentioned grounds. Her appeal was dismissed on 16 July 2007, inter alia, on the grounds that she could have complained about the acts or omissions within the criminal proceedings of the investigative institutions to the responsible prosecutor.

2.7 The author refers to the Committee's general comment No. 8 (1982) on the right to liberty and security of persons,[2] where the Committee noted that the right to be brought promptly before a judge means that the delay "must not exceed a few days". She also refers to the Views in communication No. 852/1999, *Borisenko v. Hungary*,[3] where the Committee considered a detention which lasted three days before having a detainee brought to a judicial officer too long and not fulfilling the requirement of "promptness", as provided under article 9, paragraph 3, of the Covenant, except when there are solid reasons for the delay. She further refers to communication No. 521/1992, *Kulomin v. Hungary*,[4] where the Committee considered that a prosecutor could not be considered a judicial officer for the purpose of article 9, paragraph 3.

The complaint

3.1 The author claims a violation by the State party of her rights under article 9, paragraph 3, of the Covenant, because she was not brought promptly before a judge during her detention from 20 April to 30 April 2002.

3.2 She further claims a violation of her rights under article 14, paragraph 1, of the Covenant, as with the decision of 31 May 2007 of the Leninsky District Court she was denied the protection of her rights by a competent, independent and impartial tribunal.

3.3 Finally, she claims a violation of article 2 of the Covenant in general terms and without providing any detailed explanations or argumentation thereon.

State party's observations on admissibility and merits

4.1 On 2 May 2008, the State party submitted its observations on the admissibility and merits of the communication. It explains that the author was arrested as a suspect by a senior inspector of the Brest Customs on 20 April 2002. On 22 April 2002, an inspector of the Investigation Committee of the Brest Region's Department of the Committee of State Security decided to place her in custody. Also on 22 April 2002, a Deputy Prosecutor of Brest approved the author's placement in custody. The author was released on 30 April 2002. On 27 September 2002, the author was found guilty by the Leninsky District Court of

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[2] *Official Records of the General Assembly, Thirty-seventh Session, Supplement No. 40* (A/37/40), annex V, para. 2.

[3] Communication No. 852/1999, *Borisenko v. Hungary*, Views adopted on 14 October 2002, para. 7.4.

[4] Communication No. 521/1992, *Kulomin v. Hungary*, Views adopted on 22 March 1996, para. 11.3.

Brest of having committed a crime under article 14 (1) (attempt to commit a crime), and article 228 (smuggling of a restricted currency in a large amount) of the Criminal Code and ordered the confiscation of the amount of money in question (50,000 USD). This decision was confirmed by the Brest Regional Court on 22 October 2002. The State party notes that the court's decisions were grounded and the author's guilt in the crime was confirmed by a multitude of corroborating evidence, including witnesses' testimonies and the author's own explanations to the effect that she did not want to declare the 50,000 US dollars, but declared a few hundred Polish zloti as the only money she carried, because she feared for her life during the trip.

4.2 The State party further submits that the author was detained in accordance with articles 107 (apprehension); 108 (apprehension of a suspect); 110 (procedure of apprehension); 114 (release); 115–119 (notification of apprehension and measures of restraint); 126 (detention) and 127 (time limits of detention) of the Criminal Procedure Code.

4.3 The State party also notes that, on 31 May 2007, the Leninsky District Court of Brest refused to initiate civil proceedings in relation to the author's complaint regarding the failure of the authorities to bring her promptly before a judge, as such complaint was not subject to examination within civil proceedings. This decision was upheld by the Brest Regional Court on 16 July 2007. The State party notes that these decisions were grounded and lawful, for the following reasons: under article 353 of the Civil Procedure Code, a citizen can complain about unlawful acts or omissions of, inter alia, State authorities, unless, according to the Belarusian law, there is another, non-judicial procedure for the consideration of particular complaints. Under article 139 of the Criminal Procedure Code, individuals listed in article 138 of this Code can complain to the prosecutor in charge of monitoring the investigation about acts and decisions adopted during the pretrial investigation of, inter alia, investigative authorities. Consequently, the national courts had correctly concluded that the author's complaint could not have been examined in the framework of civil proceedings.

4.4 Furthermore, the State party notes that, apart from the rights under article 9, paragraph 3, of the Covenant, article 9 of the Covenant guarantees other interrelated rights. Article 9, paragraph 1, guarantees that no one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law. While article 9, paragraph 4, of the Covenant guarantees that anyone deprived of liberty by arrest or detention shall be entitled to take proceedings before a court, in order that this court may decide without delay on the lawfulness of this detention and order his/her release if the detention is not lawful.

4.5 In this connection, the State party points out that, in line with the rights guaranteed by article 9 of the Covenant, the lawfulness of the apprehension and the measure of restraint chosen to be applied to the author — detention on remand — according to domestic laws, is subjected to judicial control. Pursuant to article 144 of the Criminal Procedure Code,[5] the lawfulness of an apprehension is determined within 24 hours, while the lawfulness of detention on remand, within 72 hours. Consequently, since the author did not avail herself of the mentioned opportunity to have the lawfulness of her detention determined, her complaint about the lack of judicial control is unfounded.

4.6 The State party notes that, given the nature of the author's complaint (failure to bring her promptly before a judge), such complaint was subjected to examination in the context of criminal law. Therefore, the author's claim that the civil court unlawfully refused to examine her complaint within civil proceedings is ill-founded and does not demonstrate that she was denied access to justice.

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[5] Article 144 of the Criminal Procedure Code: "Judicial control over lawfulness and justification of apprehension, detention on remand, house arrest or extension of period of detention on remand and house arrest".

4.7 Finally, as to the author's claim that, according to domestic legislation, she could not have complained about the omissions/inaction of officials, the State party maintains that these author's assertions are also unfounded. The State party notes that the author has not availed herself of the opportunity prescribed by article 144 of the Criminal Procedure Code to challenge the lawfulness of her apprehension and detention on remand before the courts.

Author's comments on the State party's observations

5.1 On 4 July 2008, the author reiterates that, during her detention from 20 April to 30 April 2002, the national authorities failed to bring her before a judge, in violation of article 9, paragraph 3, of the Covenant.

5.2 She further notes the discrepancies in the State party's observations. She notes that, on the one hand, the State party contends that she had no right to complain in court regarding her right under article 9, paragraph 3, and the need to complain before a prosecutor in this connection. On the other hand, she notes that the State party underlined that, pursuant to article 144 of the Criminal Procedure Code, a court could exercise judicial control over the lawfulness of the apprehension or detention on remand, in conformity with article 9, paragraph 4, of the Covenant. In this connection, the author maintains that neither a complaint to the prosecutor responsible of the monitoring of the criminal case, nor a request for judicial control over the lawfulness of her detention, were an effective remedy in the present case, for purposes of article 9, paragraph 3, of the Covenant. She notes that, in another complaint against Belarus concerning also a violation of article 9, paragraph 3, of the Covenant, submitting a complaint to the Prosecutor's Office concerning the failure of the national authorities to bring the individual promptly before a judge did not bring any relief to the victim. Further, as to the possibility to complain in court under article 144 of the Criminal Procedure Code, the author notes that the mentioned opportunity does not ensure that an individual apprehended and detained in the framework of criminal proceedings is promptly brought before a judge as prescribed by article 9, paragraph 3, of the Covenant. Therefore, she did not avail herself of the mentioned possibility to complain about her detention.

5.3 The author points out that the State party erroneously interprets the rights guaranteed under article 9, paragraph 3, of the Covenant as part of the guarantees contained in article 9, paragraph 4, of the Covenant. She stresses that the right under article 9, paragraph 3, of the Covenant to be promptly brought before a judge is a right independent of the one under article 9, paragraph 4, of the Covenant (to appeal to a court a decision of detention). The fact that the author did not avail herself of the opportunity under article 9, paragraph 4, of the Covenant (i.e. to appeal under article 144 of the Criminal Procedure Code) should not eliminate the enjoyment of her rights under article 9, paragraph 3, of the Covenant (to be promptly brought before a judge after her apprehension).

5.4 As to the State party's argument that she was apprehended and detained in accordance with articles 107; 108; 110; 114; 115–119; 126 and 127 of the Criminal Procedure Code, the author points out that none of these articles contains guarantees similar to the one guaranteed under article 9, paragraph 3, of the Covenant. Moreover, article 144 of the Criminal Procedure Code in no way guarantees for those apprehended or detained in criminal cases the right under article 9, paragraph 3, of the Covenant to be brought promptly before a judge.

5.5 As to the alleged violation of her rights under article 14, paragraph 1, of the Covenant, the author reiterates that, through its ruling of 31 May 2007, the Leninsky

District Court committed a denial of justice and denied her the protection of her rights by a competent, independent and impartial tribunal. She adds that the judiciary in the State party is not independent and impartial and is subjected to the control of the executive branch, which renders futile complaints regarding actions or omissions of the representatives of the executive power.

5.6 Finally, on the issue that she had never requested that the national authorities bring her promptly before a judge, the author emphasizes that, in any event, the fact is that she, as a person in custody as part of criminal proceedings, was never brought promptly before a judge, in violation to article 9, paragraph 3, of the Covenant.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the case is admissible under the Optional Protocol to the Covenant.

6.2 The Committee has ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

6.3 With regard to the requirement laid down in article 5, paragraph 2 (b), of the Optional Protocol, the Committee takes note of the State party's argument that the author has not appealed against her detention from 20 April to 30 April 2002 pursuant to the procedure established by article 144 of the Criminal Procedure Code. The Committee further notes, however, that, in essence, the author's claim relates not to the right guaranteed under article 9, paragraph 4, of the Covenant to bring proceedings before a court, but to her right under article 9, paragraph 3, of the Covenant, to be brought promptly before a judge following her apprehension, without having to request it, and observes that she conveyed her arguments in this respect to the State party's authorities by lodging complaints with the Committee of State Security, the State party's customs authorities, the Leninsky District Court of Brest and the Leninsky Regional Court (see paras. 2.3–2.6 above). In addition, the Committee notes that the State party has not provided any information to demonstrate the effectiveness of filing a complaint with the Prosecutor's Office about such a failure of State authorities to bring an individual promptly before a judge following an apprehension. In this connection, the Committee notes that the author's examples regarding other cases where individuals had complained in vain to a prosecutor with similar claims remained unrefuted by the State party. In the circumstances, the Committee considers that it is not precluded, by the requirements of article 5, paragraph 2 (b), of the Optional Protocol, from examining the present communication.

6.4 As to the alleged violation of the author's right under article 2 and article 14, paragraph 1, of the Covenant, the Committee considers that these claims have been insufficiently substantiated, for purposes of admissibility. In the absence of any further pertinent information on file, the Committee concludes that this part of the communication is inadmissible under article 2 of the Optional Protocol.

6.5 The Committee considers that the author has sufficiently substantiated, for purposes of admissibility, her remaining claim raising issues under article 9, paragraph 3, of the Covenant. It declares this claim admissible regarding this provision of the Covenant and proceeds to its examination on the merits.

Consideration of the merits

7.1 The Human Rights Committee has considered the communication in the light of all the information made available to it by the parties, as provided under article 5, paragraph 1, of the Optional Protocol.

7.2 The Committee notes the author's claim that her rights were violated because, from 20 April to 30 April 2002, i.e. from the moment of her actual apprehension until the moment of her release, she was never brought before a judge, in spite of the requirements of article 9, paragraph 3, of the Covenant that a person is brought before a judge promptly from the moment of actual detention.

7.3 In this regard, the Committee recalls that detention before trial should be an exception and should be as short as possible.[6] To ensure that this limitation is observed, article 9 requires that the detention be brought promptly under judicial control.[7] Prompt initiation of judicial oversight also constitutes an important safeguard against the risk of ill-treatment of the detained person. This judicial control of detention must be automatic and cannot be made to depend on a previous application by the detained person.[8] The period for evaluating promptness begins at the time of arrest and not at the time when the person arrives in a place of detention.[9]

7.4 While the meaning of the term "promptly" in article 9, paragraph 3, of the Covenant must be determined on a case-by-case basis,[10] the Committee recalls its general comment No. 8 (1982) on the right to liberty and security of persons[11] and its case law,[12] pursuant to which delays should not exceed a few days. The Committee further recalls that it has recommended on numerous occasions, in the context of consideration of the States parties' reports submitted under article 40 of the Covenant, that the period of police custody before a detained person is brought before a judge should not exceed 48 hours.[13] Any longer period of delay would require special justification to be compatible with article 9, paragraph 3, of the Covenant.[14]

7.5 In the present case, the Committee notes that the State party has failed to provide any explanation as to the necessity of detaining the author from 20 April to 30 April 2002, without bringing her before a judge, other than the fact that she did not initiate a complaint. The Committee recalls that the inactivity of a detained person is not a valid reason to delay bringing her before a judge. In the circumstances of the present communication, the

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[6] General comment No. 8 (1982) on the right to liberty and security of persons, para. 3.

[7] See, for example, communication No. 959/2000, *Bazarov v. Uzbekistan*, Views adopted on 14 July 2006, para. 8.2.

[8] See communication No. 1787/2008, *Zhanna Kovsh (Abramova) v. Belarus*, Views adopted on 27 March 2013, para. 7.3.

[9] See, for example, communication No. 613/1995, *Leehong v. Jamaica*, Views adopted on 13 July 1999, para. 9.5.

[10] See, for example, communication No. 702/1996, *McLawrence v. Jamaica*, Views adopted on 18 July 1997, para. 5.6

[11] General comment No. 8 (1982) on the right to liberty and security of persons, para. 2.

[12] See, for example, *Borisenko v. Hungary*, para. 7.4; communication No. 625/1999, *Freemantle v. Jamaica*, Views adopted on 24 March 2000, para. 7.4; communication No. 277/1988, *Teran Jijon v. Ecuador*, Views adopted on 26 March 1992, para. 5.3; and communication No. 911/2000, *Nazarov v. Uzbekistan*, Views adopted on 6 July 2004, para. 6.2.

[13] See, for example, concluding observations on Kuwait, CCPR/CO/69/KWT, para. 12; concluding observations on Zimbabwe, CCPR/C/79/Add.89, para. 17; concluding observations on El Salvador, CCPR/C/SLV/CO/6, para. 14; concluding observations on Gabon, CCPR/CO/70/GAB, para. 13.

[14] See, *Borisenko v. Hungary*, para. 7.4. See also, Basic Principles on the Role of Lawyers, principle 7.

Committee considers that the detentions of the author were incompatible with article 9, paragraph 3, of the Covenant.[15]

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the State party has violated the author's rights under article 9, paragraph 3, of the Covenant.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including reimbursement of any legal costs incurred by her, as well as adequate compensation. The State party is also under an obligation to take steps to prevent similar violations in the future. In this connection, the State party should review its legislation, in particular the Criminal Procedure Code, to ensure its conformity with the requirements of article 9, paragraph 3, of the Covenant.

10. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when it has been determined that a violation has occurred, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views, and to have them widely disseminated in Belarusian and Russian in the State party.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

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[15] See also communication No. 1787/2008, *Zhanna Kovsh (Abramova) v. Belarus*, paras. 7.3–7.5.

C. Communication No. 1764/2008, *Alekperov v. Russian Federation* (Views adopted on 21 October 2013, 109th session)*

Submitted by:	Zeydulla Vagab Ogly Alekperov (represented by his sister, Rafizat Magaramova)
Alleged victim:	The author
State party:	Russian Federation
Date of communication:	16 January 2008
Subject matter:	Unavailability of a jury trial and commutation of the death sentence to life imprisonment
Procedural issue:	Level of substantiation of claims; exhaustion of domestic remedies
Substantive issues:	Right to effective remedy; right to life; prohibition of torture, cruel or inhuman and degrading treatment or punishment; right to a fair hearing by an independent and impartial tribunal; freedom from interference with correspondence; retroactive application of a criminal law providing for a lighter penalty; prohibition of discrimination
Articles of the Covenant:	2; 6; 7; 14; 15; 17 and 26
Article of the Optional Protocol:	2 and 5, paragraph 2 (b)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 21 October 2013,

Having concluded its consideration of communication No. 1764/2008, submitted to the Human Rights Committee by Zeydulla Vagab Ogly Alekperov under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Zeydulla Vagab Ogly Alekperov, an Azerbaijani national born in 1971, currently serving a life sentence in a correctional facility

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* The following members of the Committee participated in the examination of the present communication: Mr. Yadh Ben Achour, Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Walter Kälin, Ms. Zonke Zanele Majodina, Mr. Kheshoe Parsad Matadeen, Mr. Gerald L. Neuman, Sir Nigel Rodley, Mr. Victor Manuel Rodríguez-Rescia, Mr. Fabián Omar Salvioli, Ms. Anja Seibert-Fohr, Mr. Yuval Shany, Mr. Konstantine Vardzelashvili and Ms. Margo Waterval.

in Sol-Iletsk, in the Russian Federation. He claims to be a victim of a violation by the State party[1] of his rights under articles 2, 6, 7, 14, 15, 17 and 26 of the Covenant. He is represented by his sister, Rafizat Magaramova.

The facts as presented by the author

2.1 On 13 October 1995, the author was sentenced to death, with confiscation of property, on numerous charges, by the Murmansk Regional Court, which was composed of a professional judge and two lay judges. The author claims that he was not tried by a competent tribunal, as he was deprived of the right, guaranteed by articles 20;[2] 47[3] and 19[4] of the Russian Constitution (hereinafter "the Constitution"), to have his case examined by a jury.

2.2 The author notes that on 16 July 1993, pending the establishment of the jury system in the Russian Federation, the Law On Introducing Changes and Amendments to the Law of the Russian Soviet Federative Socialist Republic (hereinafter "the RSFSR") On the RSFSR Judicial System, the RSFSR Code of Criminal Procedure, the RSFSR Criminal Code and the RSFSR Code on Administrative Offences (hereinafter "the Law of 16 July 1993") was adopted. Paragraph 7, section II, of the Law added a new section 10 to the RSFSR Code of Criminal Procedure "On jury trial". According to paragraph 2 of the decision of the Russian Supreme Council (Parliament), also adopted on 16 July 1993 (hereinafter "the decision of 16 July 1993"), jury trials were first to be introduced, as of 1 November 1993, in five subjects, or regions, of the Russian Federation (Stavropol, Ivanovo, Moscow, Ryazan and Saratov) and then, as of 1 January 1994, in four other subjects (Altai, Krasnodar, Ulyanovsk and Rostov). Therefore, as of 13 October 1995, i.e. the date when the author's sentence was handed down, death penalty cases were examined by a jury in the nine regions of the Russian Federation. In this regard, the author claims that, in violation of articles 15[5] and 46[6] of the Constitution, a jury system had not been set up in the Murmansk Region at that time.

2.3 On 23 January 1996, the author's sentence was upheld by the Supreme Court. Although the author did not invoke a violation of the Constitutional provisions in his cassation appeal, due to his lack of legal knowledge, he submits that the Supreme Court was under an obligation to take note of these violations and quash his sentence.

2.4 On 21 December 1998, the author's death sentence was commuted to life imprisonment by a presidential decree of pardon. He claims that, in violation of article 18 of the Constitution, establishing that administration of justice in the Russian Federation is carried out only by courts, his life imprisonment was prescribed by presidential decree. Moreover, the presidential decree itself is contrary to article 54 of the Constitution[7] and article 10 of the Russian Criminal Code, as the RSFSR Criminal Code at the time of the commission of the crime (July 1994) did not provide for punishment in the form of life imprisonment. Maximum imprisonment for the crime he committed was 15 years, or the death penalty.

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[1] The Optional Protocol entered into force for the State party on 1 January 1992.

[2] Article 20 of the Constitution reads: "(1) Everyone shall have the right to life. (2) Capital punishment until its complete elimination may be envisaged by a Federal Law as an exclusive penalty for especially grave crimes against life, and the accused shall be granted the right to have his case examined by a jury."

[3] Article 47 of the Constitution reads: "(1) No one may be deprived of the right to have his case considered by competent court and judge, having jurisdiction over it under the law. (2) Any accused shall have the right to have his case examined by a jury, when such an opportunity is provided for under the Federal Law."

[4] Article 19, paragraph 1, of the Constitution reads: "Everybody is equal before the law and court."

[5] Article 15, paragraph 1, of the Constitution reads: "The Constitution of the Russian Federation shall have the supreme juridical force, direct action and shall be used on the whole territory of the Russian Federation. Laws and other legal acts adopted in the Russian Federation shall not contradict the Constitution."

[6] Article 46, paragraph 1, of the Constitution reads: "Everyone shall be guaranteed the judicial protection of his rights and freedoms."

2.5 Upon the request of the Moscow City Court and on the basis of the complaints of three prisoners, Mr. G., Mr. F. and Mr. K., the Russian Constitutional Court examined the constitutionality of paragraphs 1 and 2 of the decision of 16 July 1993.[8] On 2 February 1999, the Constitutional Court found that paragraph 1 of the decision was in part contrary to articles 19, 20 and 46 of the Constitution, as it did not provide for the realization of the right, afforded to all accused persons liable to the death penalty, to have their cases examined by a jury throughout the territory of the Russian Federation. The Constitutional Court held that paragraph 1 of the decision of 16 July 1993 could no longer be used as a ground for refusing motions for jury trial and that the sentenced person should be afforded the opportunity to have their cases examined by a jury. Between the entry into force of the Constitutional Court's decision of 2 February 1999 and the entry into force of a federal law ensuring that the right to a trial by jury is effectively realized throughout Russia, the death penalty cannot be imposed by a court of any composition (a jury, with three professional judges or one professional judge and two lay judges).

2.6 The author claims that under article 10 of the Criminal Code, article 54 of the Constitution and article 397, paragraph 13, of the Code of Criminal Procedure, a competent court was supposed, on its own initiative, to bring his sentence into compliance with the Constitutional Court's decision of 2 February 1999. This was not done, and the author did not petition the court to initiate a review procedure because of his ignorance of the law.

2.7 In 2004, the author petitioned the Sol-Iletsk District Court of the Orenburg Region to bring his case into compliance with changes introduced to the Criminal Code by the law of 8 December 2003 "On Introducing Changes and Amendments to the Criminal Code". On 29 June 2004, the Sol-Iletsk District Court reviewed the author's sentence and changed the legal classification of some of his actions but retained the sentence as life imprisonment. The author claims that the Sol-Iletsk District Court failed to bring his sentence into compliance with the law then in force, and, specifically, the Constitutional Court's decision of 2 February 1999.

2.8 In March 2006, the author learned of the decision of the Zlatoust City Court of the Chelyabinsk Region of 29 January 2001, which brought the sentence of another prisoner, Mr. D., into compliance with the Constitutional Court's decision of 2 February 1999. The author was told that this decision was a precedent that he could use in order to petition a competent court concerning his case. On an unspecified date, he submitted such a petition to the Sol-Iletsk District Court of the Orenburg Region.

2.9 On 23 August 2006, the Sol-Iletsk District Court of the Orenburg Region rejected the author's petition on grounds of lack of jurisdiction on the matter, explaining that it fell under the jurisdiction of the Præsidium of the Supreme Court. The author claims that this decision violated his rights under article 397, paragraph 13, of the Code of Criminal

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[7] Article 54 of the Constitution reads: "(1). A law introducing or aggravating responsibility shall not have retrospective effect. (2). No one shall be held guilty of any act which was not regarded as a criminal offence when it was committed. If, subsequent to the commission of the offence, provision is made by law for the removal of the criminal responsibility or the mitigation of the penalty, the new law should apply".

[8] See para. 2.2 above.

Procedure and article 19 of the Constitution, as this court was at the same level in the hierarchy of courts as the Zlatoust City Court of the Chelyabinsk Region (see paragraph 2.8 above) and therefore it was endowed with the same authority as the latter to bring his sentence into compliance with the Constitutional Court's decision of 2 February 1999.

2.10 In October 2006, the author submitted a petition to the Chairperson of the Supreme Court. On 2 March 2007, the petition was rejected by a judge of the Supreme Court on the grounds that the author did not participate in the constitutional proceedings that resulted in the Constitutional Court's decision of 2 February 1999. There was therefore no basis under article 49 of the Code of Criminal Procedure or review of his sentence. The author submits that despite the fact that Mr. D. (see paragraph 2.8 above) did not participate in the constitutional proceedings in question, his sentence was brought into compliance with the Constitutional Court's decision of 2 February 1999. Moreover, the Constitutional Court cannot take two decisions on the same matter and, when a similar issue arises, the courts should be guided by the existing decision of the Constitutional Court.[9]

2.11 By a letter received on 31 August 2010, the author's sister informed the Committee that the author was experiencing continual difficulties receiving and sending correspondence in relation to the present communication. In particular, although he received the letter of the Committee of 31 March 2010, his comments of 4 May 2010[10] sent to her address for subsequent transmittal to the Committee have never reached her. On 7 July 2010, the author sent a copy of his comments of 4 May 2010 to her address, but she has not received these either. The author's sister requested the Committee: (1) not to discontinue his communication; (2) to inform the Permanent Mission of the Russian Federation in Geneva about the interference with his correspondence with the Committee, and (3) to request the Permanent Mission of the Russian Federation to provide explanations.[11]

The complaint

3.1 The author claims that the above-mentioned facts amount to a violation by the State party of his rights under articles 2, 6, 7, 14, 15 and 26 of the Covenant.[12] In particular, he argues that he was not tried by a competent court, in violation of articles 2, 6 and 14 of the Covenant. He refers to articles 14 and 15 of the Covenant to complain that his sentence was not brought into compliance with the Constitutional Court's decision of 2 February 1999, providing all accused with the right to have their criminal cases examined in a jury trial. He also argues that, in violation of article 15 of the Covenant, (1) he was pardoned by the President rather than a court, despite the fact that domestic courts are responsible for the administration of justice in Russia; and that (2) a heavier penalty was imposed on him, as a result of the commutation of sentences, than that which was applicable at the time of commission of the crime, i.e. 15 years' imprisonment. He further alleges a breach of article

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[9] On 10 September 2008, the author applied to the European Court of Human Rights, alleging a violation of article 7 (no punishment without law) of the European Convention. On 17 April 2009, the European Court of Human Rights declared the author's complaint inadmissible as it did not meet the admissibility criteria laid out in articles 34 and 35 of the Convention. Having regard to all material in its possession, the Court established that the complaints submitted by the author, insofar as they fall within its competence, do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols.

[10] The author's submissions of 4 May 2010 have not reached the Committee.

[11] On 24 November 2010, the Committee requested the State party to comment on the information imparted by the author's sister regarding his difficulty receiving and sending correspondence in relation to the present communication due to alleged interference from prison authorities.

[12] The author includes article 7 in his initial list of articles of the Covenant violated, but thereafter does not refer to it again or explain how it is relevant to his complaint.

26 of the Covenant, as he was denied a trial by jury in the Murmansk Region, whereas death penalty cases were tried by jury in the nine other Russian regions.

3.2 The author also complains of unlawful interference with his correspondence with the Committee in relation to his communication, which raises issues under article 17, paragraph 1, of the Covenant.

State party's observations on admissibility and merits

4.1 By a note verbale of 22 July 2008, the State party submitted that the decisions adopted in the author's case were in compliance with its international obligations and domestic legislation, and that his allegations are unfounded. The author was sentenced to death on 13 October 1995 by the Murmansk Regional Court. His case was considered by a tribunal composed of a professional judge and two lay judges. On 23 January 1996, the Supreme Court upheld his sentence on appeal. On 29 June 2004, the Sol-Iletsk District Court reviewed the author's sentence and changed the legal classification of some of his actions, bringing it into compliance with the law of 8 December 2003.[13] The court confirmed the author's life imprisonment.

4.2 Pursuant to article 421 of the RSFSR Code of Criminal Procedure, any person accused of a crime for which the death penalty is prescribed and which falls within the jurisdiction of a territorial, regional or a city court, as stated in article 36 of the Code, could request that his case be examined with the participation of a jury. The author was accused of a crime falling under the jurisdiction of such a court. However, at the time of examination of his death penalty case, jury trials had not yet been introduced in the Murmansk Region. According to chapter 2, part 6, of the "Final and Transitional Provisions" of the Constitution, until the entry into force of the federal law setting out the procedure for the examination of cases by a jury, the existing procedure of examination of that category of cases by courts is preserved.

4.3 Pursuant to article 8 of the Federal Law of 18 December of 2001 No. 177-FZ "On putting into effect the Russian Criminal Procedure Code" with amendments, jury trials were introduced in the Murmansk Region as of 1 January 2003. On 13 April 2000, the Constitutional Court examined the constitutionality of article 421 of the RSFSR Code of Criminal Procedure. By its decision No. 69-0, the Court held that transferring a criminal case for consideration from a court having territorial jurisdiction over it to another court, for the sole reason that a jury trial was unavailable in the former court, is contrary to article 47, paragraph 1, of the Constitution. The State party further points out that, at the time of the events, the author did not object to the examination of his criminal case by a tribunal with the participation of two lay judges. His case was therefore considered by a tribunal of due composition.

4.4 The State party further submits that, on 21 December 1998, the author was pardoned by presidential decree and the death penalty was commuted to life imprisonment, which is a more lenient penalty. The presidential decree pardoning the author was adopted in the exercise of the President's constitutional prerogative to pardon. Pardon operates outside the framework of administration of justice in criminal cases, which requires compliance with articles 10 and 54 of the Russian Criminal Code, proscribing the retroactive application of the law aggravating the liability of a person. The presidential decree was issued in compliance with articles 59 and 85 of the Russian Criminal Code, then in force, which provides for the possibility of commutation of death sentences to life imprisonment. Article 24 of the RSFSR Criminal Code, which was in force at the time of the commission of the crime by the author, also provided for commutation of the death penalty to life imprisonment. Pardon is not linked to the issues of criminal responsibility or determination of sentences, which are governed by criminal procedure provisions and decided exclusively by courts.

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[13] See para. 2.7 above.

4.5 The State party further refers to decisions of the Constitutional Court Nos. 60-0 and 61-0 of 11 January 2002 in the cases of A.G. and I.F. respectively, according to which pardon, as an act of mercy, cannot lead to consequences which are more serious for the convict than those provided for in criminal law establishing criminal liability and decided by court on a specific case. Therefore, commutation, by way of pardon, of the death sentence to a lighter one (in the author's case – to life imprisonment) under the criminal law in force, cannot be deemed as worsening the convict's situation.

4.6 According to article 413, paragraph 4(1), of the Russian Code of Criminal Procedure, in force as of 1 July 2002, a criminal case can be reviewed in the light of newly established circumstances, in particular, in the event that the Constitutional Court finds that the law applied to such a case is contrary to the Constitution. The State party notes that the author did not participate in the proceedings before the Constitutional Court that resulted in the decision of 2 February 1999. Therefore there were no grounds under article 49 of the Russian Code of Criminal Procedure to review his case.

4.7 The decision of the Zlatoust City Court of 29 January 2001 also does not provide grounds for reviewing the author's case. Court decisions do not have precedential value under the Russian law. Furthermore, the amendments to article 24 of the Russian Criminal Code, which provided for the possibility of commutation of the death penalty to life imprisonment by way of pardon, were introduced by Federal Law No. 4123-1 of 17 December 1992 and came into force as of 6 January 1993. Prior to that, article 24 of the RSFSR Criminal Code, with amendments of 28 May 1986, provided for the possibility of commutation of the death penalty to 15 to 20 years' imprisonment. Mr. D., whose sentence was modified by the Zlatoust City Court,[14] had committed the crime on 12 November 1992, i.e. before the entry into force of the Federal Law of 17 December 1992. There is therefore nothing in the case file to suggest that the author was deprived of his rights under the RSFSR Criminal Code and the RSFSR Code of Criminal Procedure applicable at the time or under the provisions of the Covenant.

Author's comments on the State party's observations

5.1 On 6 December 2011, the author challenged the State party's argument that at the time his sentence was delivered (13 October 1995), the federal law providing for the establishment of jury trials was not enforced and there were no jury trials in the Murmansk Region. He argues that jury trials had been introduced by virtue of the law of 16 July 1993,[15] that is, even before the entry into force of the Russian Constitution on 12 December 1993. By the decision of the Russian Supreme Council of 16 July 1993,[16] jury trials were to be introduced in nine regions by 1 January 1994 at the latest.

5.2 The author argues that the State party had enough time, from 12 December 1993 (the entry into force of the Constitution) to 13 October 1995 (the date of delivery of his sentence), to establish jury trials throughout the Russian Federation. The State party's failure to do so resulted in a violation of his rights under articles 20 and 47 of the Constitution and article 6 of the Covenant, as he was deprived of the possibility of filing a petition to have his case examined by a jury. The author further claims a violation of his rights under article 19 of the Constitution and article 26 of the Covenant, protecting the right to equality before the law, as the State party's failure to establish jury trials in the Murmansk Region placed him at a disadvantage by comparison with the accused in the nine regions where they could request the examination of their cases by a jury. The author further submits that the State party's failure to ensure the realization of his right to apply for the examination of his case by a jury, as enshrined in article 20 of the Constitution, implies that the Murmansk Regional Court, composed of a professional judge and two lay judges who found him guilty on 13 October 1995, was not competent to impose the death penalty on him. Therefore, after the entry into force, on 12 December 1993, of the Constitution, which provides that the death penalty cannot be applied unless the criminal case is examined by a jury, the State party should have adopted a law proscribing the death sentence until jury trials are created throughout Russia. However, such a law was adopted only after the Constitutional Court's decision of 2 February 1999, which was prompted by citizens' claims alleging violations of their rights to a jury trial.

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[14] See para. 2.8 above.

[15] See para. 2.2 above.

[16] Ibid.

5.3 The author further maintains that commutation of the death penalty to life imprisonment is unlawful, as, pursuant to the RSFSR Criminal Code in force at the time of the commission of the crime, imprisonment could not exceed 20 years.

5.4 With reference to the Constitutional Court's decision of 2 February 1999, the author notes that Mr. F.'s sentence,[17] which prompted this decision, was subject to review. This implies, according to the author, that the Constitutional Court acknowledged that (1) Mr. F.'s death sentence had been handed down in breach of the Constitution and that (2) the breach had occurred before the Constitutional Court's decision of 2 February 1999. Given that the author, like Mr. F., was sentenced to death before the decision of 2 February 1999, the author claims a violation of his rights to equality before the law and to equal protection before the law, under article 19 of the Constitution and article 26 of the Covenant. The author further maintains that such a violation should lead to a review of his case due to newly established circumstances, under article 413, paragraph 4(1), of the Russian Code of Criminal Procedure. He challenges the State party's argument that the outcome of the constitutional proceedings is inapplicable to his case since he did not participate therein. He refers to the decision of the Zlatoust City Court of 29 January 2001, whereby the sentence of another prisoner, Mr. D., was brought into compliance with the Constitutional Court's decision, notwithstanding the fact that he not did participate in the constitutional proceedings either.[18]

5.5 The author further refutes the State party's argument that at the time of the commission of the crime by Mr. D., the law provided for the possibility of commutation of the death penalty to 15 to 20 years' imprisonment, whereas at the time of the commission of the crime by the author, the law provided for its commutation to life imprisonment. He argues that this provision is contrary to article 21 of the RSFSR Criminal Code as life imprisonment is not listed among the types of penalties contained therein. Therefore, the President cannot, in exercise of his right to pardon, assign a penalty which has no basis under domestic law.

5.6 In the light of the above, the author requests that the State party bring his sentence into compliance with the Constitutional Court's decision of 2 February 1999, as done by the Zlatoust City Court with respect to Mr. D. Alternatively, the author requests that, in accordance with the said decision, his sentence be reviewed, quashed and transferred to the Murmansk Regional Court for reconsideration with the participation of a jury, given that jury trials were established throughout the Russian Federation as of 1 January 2010.

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[17] See para. 2.5 above.
[18] See para. 2.8 above.

5.7 The author adduces to his submission an open letter addressed to the Chairperson of the Supreme Court by a lawyer from Stavropol, Russia, which refers to difficulties in the application of the Constitutional Court's decision of 2 February 1999 to death sentences, which became final prior to this date.

Additional observations by the State party

6.1 By note verbale of 21 February 2011, the State party submitted that since 23 May 2001, the author has been serving his prison sentence in Correctional facility No. 6 of the Administration of the Federal Penitentiary Service in the Orenburg Region (*Исправительная кололония № 6 Управления Федеральной Службы Исполнения Наказаний Россиии по Оренбургской области, ИК-6*, hereinafter "IK-6"). During this period, the author has sent 87 pieces of correspondence to various domestic authorities and non-governmental organizations, including three letters addressed to the Committee[19] and a letter addressed to the Organization of the United Nations.[20] No delays in processing or sending the author's correspondence have been recorded by the prison administration. The author has been duly informed that his correspondence has been dispatched, which is confirmed by his signature on supporting documents. According to the IK-6 administration, no correspondence from the Committee has been received to the author's attention.

6.2 The State party further submits that the author has never complained of any interference with sending or receiving his correspondence while serving his prison sentence in IK-6. In addition, a service check conducted by the prison authorities further to the Committee's query[21] demonstrated no indication of a violation of the author's rights to suggestion, submission and complaint, as protected under article 12 of the Russian Code of Criminal Procedure.

Further submissions by the author

7.1 On 6 December 2011, the author added that he had received five letters from the Committee requesting him to submit comments on the State party's submissions. The last letter was received on 2 December 2011. He notes that he has replied to the first four letters, which is partly confirmed by the State party's submission of 21 February 2011.

7.2 The author confirms the State party's finding that he has sent three letters to the Committee through the IK-6 prison authorities. These letters contained his comments on the State party's observations of 22 July 2008. The last letter was registered under No. 56/5 A-54 and dispatched on 28 July 2010. The author sent copies of these letters to his sister and instructed her to send them to the Committee. It appears that neither his sister nor the Committee received these letters. His sister therefore complained of interference with his correspondence (on 31 August 2010) and the Committee requested the State party to comment on the situation (on 24 November 2010).

7.3 The author adds that in early December 2010, the IK-6 prison authorities informed him of the Committee's request of 24 November 2010. According to the State party's submissions of 21 February 2011, the author confirmed in writing that the prison authorities did not interfere with his correspondence. The prison authorities sent all his letters to the Committee and his sister, and informed him of the registration numbers thereof. The author further reiterates that he is unable to explain why these letters have not reached the addressees.

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[19] Two letters, Nos. 56/4-A-54 of 8 and 18 June 2009, and letter No. 56/5-A-54 of 28 July 2010.

[20] Letter No. 56/4-A/114 of 30 November 2009.

[21] On 24 November 2010, the Committee requested the State party to comment on the information imparted by the author's sister regarding his difficulty receiving and sending correspondence in relation to the present communication, due to alleged interference from the prison authorities (see para. 2.11 above).

Issues and proceedings before the Committee

Consideration of admissibility

8.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

8.2 The Committee has ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement. The Committee notes that a similar claim filed by the author was declared inadmissible by the European Court of Human Rights on 17 April 2009. It observes however that the matter is no longer pending before another procedure of international investigation or settlement and that the Russian Federation has not entered a reservation to article 5, paragraph 2 (a), of the Optional Protocol. Therefore, the Committee is not precluded by article 5, paragraph 2 (a), of the Optional Protocol from considering the present communication.

8.3 The Committee notes that the author claims that there has been a violation of his rights under article 2 of the Covenant, without clarifying the nature of the violation of this provision. It observes that the provisions of article 2 of the Covenant, which lay down general obligations for States parties, cannot, in isolation, give rise to a claim in a communication under the Optional Protocol.[22] However, insofar as the author invokes article 2 along with article 14 as the basis for a claim that he was discriminatorily denied the right to jury trial, the Committee considers the claim sufficiently substantiated for purposes of admissibility.

8.4 The Committee takes note of the author's claim that his rights under article 7 of the Covenant have been violated. However, in the absence of any information or evidence in support of this claim, the Committee finds it insufficiently substantiated for purposes of admissibility, and declares it inadmissible under article 2 of the Optional Protocol.

8.5 The Committee takes note of the author's sister's claim regarding the alleged interference by IK-6 prison authorities with the author's correspondence related to the present communication, which potentially raises issues under article 17 of the Covenant.[23] The Committee notes that, as submitted by the State party and acknowledged by the author, the latter has never complained of interference with his correspondence to the IK-6 prison authorities during the relevant period. The Committee also notes that the State party conducted an official verification of these allegations, and it was established that the prison authorities had processed and dispatched the author's incoming and outgoing correspondence in a timely manner and notified him thereof, which is confirmed by his signature.[24] It further observes that the author does not refute the above arguments of the State party and confirmed that it has received and replied to all the Committee's correspondence on his case.[25] Under such circumstances, the Committee cannot conclude that the fact that the author's letter of 4 May 2010 has not reached it is attributable to the State party's authorities. Therefore, the Committee considers that this part of the communication is insufficiently substantiated for purposes of admissibility, and declares it inadmissible under article 2 of the Optional Protocol.

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[22] See, inter alia, communications No. 316/1988, *C.E.A. v. Finland*, decision of 10 July 1991, para. 6.2; No. 802/1998, *Rogerson v. Australia*, Views adopted on 3 April 2002; and No. 1213/2003, *Sastre Rodriguez et al v. Spain*, decision of 28 March 2007, para. 6.6.

[23] See para. 2.11 above; communication No. 512/1992, *Pinto v. Trinidad and Tobago*, Views adopted on 16 July 1996, para. 8.5.

[24] See paras. 6.1 and 6.2 above.

[25] See paras. 7.1 to 7.3 above.

8.6 The Committee considers that the author's remaining claims raise issues under articles 2, 6, 14 (1), 15 (1), and 26 of the Covenant, have been sufficiently substantiated for purposes of admissibility, and proceeds to their examination on the merits.

Consideration of the merits

9.1 The Human Rights Committee has considered this communication in the light of all the information received, in accordance with article 5, paragraph 1, of the Optional Protocol.

9.2 The Committee notes that the author's claims (1) that he was not afforded a trial by jury; (2) that the domestic courts failed to bring his death sentence into compliance with the Constitutional Court's decision of 2 February 1999; and (3) that his pardon was decided by the President and not by a court, raise issues under article 14, paragraph 1, of the Covenant, in particular regarding the right to a fair hearing by a competent tribunal, as established by law.

9.3 As regards the unavailability of a jury trial in the author's case, the Committee takes note of the State party's argument that his sentence was handed down on 13 October 1995 by a court composed of one professional judge and two lay judges, and that this was due to the fact that, at that time, trials by jury had not yet been introduced in the Murmansk Region. The State party further pointed out that, at the material time, the author did not object to the examination of his criminal case by a court of such composition and that this remained unrefuted by the author. The Committee also notes the State party's explanation that the author's case was considered by a competent tribunal established by law, since, according to chapter 2, part 6, of the "Final and Transitional Provisions" of the Constitution, the previous procedure for examination of that category of cases by courts was preserved until the entry into force of the federal law setting out the procedure for the examination of cases by a jury. The Committee also takes note of the State party's reference to the Constitutional Court's decision of 13 April 2000, according to which transferring a criminal case for consideration to a court other than the court having territorial jurisdiction over it, for the sole reason that a jury trial is unavailable in the latter, would amount to a violation of the constitutional right to have one's case considered by a competent court.[26] In light of these explanations, the Committee considers that the author's case was examined by a competent tribunal within the meaning of article 14, paragraph 1, of the Covenant.[27]

9.4 As regards the alleged failure of the domestic courts to review the author's death sentence on the basis of the Constitutional Court's decision of 2 February 1999, the Committee observes that, in essence, the author challenges the temporal application of the Constitutional Court decision and the failure to follow the example of the Zlatoust City Court. As such, this claim relates to the interpretation of domestic law. The Committee reiterates its jurisprudence that the evaluation of facts and evidence and interpretation of domestic legislation is in principle a matter to be decided by the courts of States parties, unless the determination was clearly arbitrary or amounted to a denial of justice.[28] However, the author has not shown that such is the case in the decision of the Sol-Iletsk District Court of the Orenburg Region,[29] which reviewed his sentence. In particular, the Committee recalls that the Constitutional Court ruled that from the moment of the entry into force of its decision (2 February 1999) and until the adoption of a federal law ensuring the exercise of the right of the accused liable to the death penalty to be tried by a jury, the imposition of the death penalty was no longer permissible. The Committee takes note of the State party's argument that the decision does not have retroactive effect and that death sentences handed down prior to its entry into force (i.e., prior to 2 February 1999) were not subject to review on the basis of the decision. The Committee observes that the author was sentenced to death on 13 October 1995, over three years and seven months before the entry into force of the said decision, and that therefore the decision cannot serve as a legal basis for the review of his sentence. The Committee also takes note of the State party's argument that the decision of the Zlatoust City Court involved an individual who, unlike the author, had been convicted of a crime committed prior to a relevant amendment to the Criminal Code in 1992. In the light of the above, the Committee is satisfied that there has been no indication of arbitrariness or denial of justice in the present case.

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[26] See paras. 4.2 and 4.3 above.

[27] See communication No. 1861/2009, *Bakurov v. Russian Federation*, Views adopted on 25 March 2013, para. 10.3.

9.5 As regards the author's objection to the commutation of his sentence by presidential decree rather than by a court, the Committee notes the State party's arguments that the decree was adopted in the exercise of the President's constitutional prerogative to pardon, and carried out in compliance with articles 59 and 85 of the Russian Code of Criminal Procedure, in force at the time of the pardon, and article 24 of the RSFSR Code of Criminal Procedure, in force at the time of commission of the crime, which both provide for the possibility of commutation of the death penalty to life imprisonment.[30] The Committee recalls that the discretionary power of commutation, which is specifically contemplated in relation to death sentences by article 6, paragraph 4, of the Covenant, may be vested in a Head of State or other executive body without infringing article 14.[31] The Committee has no basis for finding the State party's position, — that the executive power of pardon is consistent with its Constitution — arbitrary.

9.6 In the light of the above considerations, the Committee finds that the materials on file do not permit it to conclude that the author's rights under article 14, paragraph 1, of the Covenant, have been violated in the present case.

9.7 With regard to the author's claim under article 6 of the Covenant, the Committee observes that, on 21 December 1998, the author was pardoned by presidential decree and his death sentence imposed on 13 October 1995 commuted to life imprisonment. In the circumstances, the Committee will not examine separately the author's claims under this provision of the Covenant.[32]

9.8 The Committee notes the author's claim that the commutation of his death sentence to life imprisonment amounts to a violation of his rights under article 15, paragraph 1, of the Covenant. The Committee notes in this respect the author's arguments that (1) the

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[28] See, e.g., communication No. 967/2001, *Valentin Ostroukhov v. the Russian Federation*, decision adopted on 31 March 2005, para. 6.4.

[29] See paras. 2.7 and 2.9 above.

[30] See para. 4.4 above.

[31] See general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, *Official Records of the General Assembly, Sixty-second Session, Supplement No. 40*, vol. I (A/62/40 (Vol. I)), annex VI, para. 17; communication No. 845/1998, *Kennedy v. Trinidad and Tobago*, Views adopted 26 March 2002, para. 7.4.

[32] See, e.g., communication No. 1861/2009, *Bakurov v. Russian Federation*, Views adopted on 25 March 2013, para. 10.5.

Constitutional Court's decision of 2 February 1999 outlawed the death penalty and therefore the sanction for the crime he committed was reduced (maximum 15 or 20 years' imprisonment);[33] (2) as a consequence of the presidential pardon, a heavier penalty was imposed on him than that which was applicable at the time of commission of the crime; and (3) his pardon should have been decided by a court.

9.9 The Committee observes that article 15, paragraph 1, of the Covenant regards the nature and the purpose of the penalty, its characterization under national law and the procedures regarding the determination and the enforcement of the penalty as part of the criminal proceedings. The Committee further notes that pardon is in essence humanitarian or discretionary in nature, or motivated by considerations of equity, not implying that there has been a miscarriage of justice.[34] It points out that, as argued by the State party, the death penalty could be commuted to life imprisonment under both the law in force at the time of the crime and the law in force at the time of the pardon, and that the power of commutation was vested in the president by the Constitution at all relevant times.[35] It also notes that, in any event, life imprisonment cannot be seen as constituting a heavier penalty than the death penalty. The Committee therefore concludes that there has been no violation of article 15, paragraph 1, of the Covenant.[36]

9.10 The Committee further notes that the author also claims that there has been a violation of his rights under article 26 of the Covenant, as he was not afforded the option of having his case examined by a jury, whereas this option was offered to accused persons liable to the death penalty in other Russian regions. The Committee takes note of the State party's reference to chapter 2, part 6, of the "Final and Transitional Provisions" of the Constitution of the Russian Federation, setting out that until the entry into force of the federal law establishing the procedure for jury trials, the existing procedure for examination of that category of cases by courts should be preserved.[37] It further notes that jury trials were initially introduced in nine Russian regions but that the Murmansk Region was not one of them.[38] According to the information provided by the State party, trial by jury was introduced in the Murmansk Region as of 1 January 2003, pursuant to article 8 of the Federal Law of 18 December 2001.[39] The Committee recalls its jurisprudence[40] to the effect that while the Covenant contains no provision establishing a right to a trial by jury in criminal cases, if such a right is provided under the domestic law of a State party, and is granted to some persons charged with crimes, it must be granted to others similarly situated on an equal basis. If distinctions are made, they must be based on objective and reasonable grounds. The Committee notes that the availability of a jury trial is governed by federal law, but that, until the above-mentioned law of 18 December 2001, there was no federal law on the subject. The Committee considers that the fact that a federal State permits differences among the federal units in respect of jury trial does not in itself constitute a violation of article 26 of the Covenant.[41] Since the author has not provided any information to the effect that jury trials have been held in death-penalty cases in the Murmansk Region to substantiate a difference in treatment between him and other accused persons, the Committee cannot conclude that there has been a violation of his rights under article 26 of the Covenant. For similar reasons, the Committee finds no violation of the author's rights under article 2, paragraph 1, read in conjunction with article 14 of the Covenant.

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[33] The author refers to 15 years' imprisonment in paragraph 3.1 above but to up to 20 years' imprisonment in paragraph 5.3 above.

[34] See communication No. 1425/2005, *Marz v. Russian Federation*, Views adopted on 21 October 2009, para. 6.6.

[35] See para. 4.4 above.

[36] See communication No. 1861/2009, *Bakurov v. Russian Federation*, para. 10.9.

[37] See para. 4.2 above.

[38] See para. 2.2 above.

[39] See para. 4.3 above.

[40] See communications Nos. 1861/2009, *Bakurov v. Russian Federation*, para. 10.6 and No. 790/1997, *Cheban et al. v. Russian Federation*, Views adopted on 24 July 2001, para. 7.2.

[41] See communications Nos. 1861/2009, *Bakurov v. Russian Federation*, para. 10.6 and No. 1425/2005, *Marz v. Russian Federation*, para. 6.3.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it do not reveal a breach of any provision of the Covenant.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

D. Communication No. 1795/2008, *Zhirnov v. Russian Federation* (Views adopted on 28 October 2013, 109th session)*

Submitted by:	Oleg Anatolevich Zhirnov (not represented by counsel)
Alleged victim:	The author
State party:	Russian Federation
Date of communication:	3 September 2004 (initial submission)
Subject matter:	Unfair trial
Procedural issue:	None
Substantive issues:	Right to have adequate time and facilities for the preparation of a criminal defence, to communicate with a counsel of his own choosing and to have legal assistance assigned to him, in any case where the interests of justice so require
Articles of the Covenant:	14, paragraphs 3 (b) and (d)
Article of the Optional Protocol:	None

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 28 October 2013,

Having concluded its consideration of communication No. 1795/2008, submitted to the Human Rights Committee by Mr. Oleg Anatolevich Zhinov under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Mr. Oleg Anatolevich Zhirnov, a Russian citizen born in 1972, in prison in the Russian Federation at the time of the submission. He alleges that he is a victim of violations by the State party[1] of his rights under article 14, paragraphs 3 (b) and (d), of the International Covenant on Civil and Political Rights. The author is unrepresented.

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* The following Committee members participated in the examination of the present communication: Mr. Yadh Ben Achour, Mr. Ahmad Amin Fathalla, Mr. Kheshoe Parsad Matadeen, Sir Nigel Rodley, Mr. Fabián Omar Salvioli, Mr. Yuval Shany, Mr. Konstantine Vardzelashvili, Mr. Lazhari Bouzid, Mr. Walter Kälin, Mr. Yuji Iwasawa, Mr. Cornelis Flinterman, Ms. Zonke Zanele Majodina, Mr. Gerald L. Neuman, Mr. Victor Manuel Rodriguez-Rescia, Ms. Anja Seibert-Fohr and Ms. Margo Waterval.

[1] The Optional Protocol entered into force for the Russian Federation on 1 January 1992.

Factual background

2.1 The author submits that, on an unspecified date, he was arrested and charged with murder, extortion and kidnapping. He claims that when in July 2000 an investigator from the Volzhskaya Prosecutor's Office of Samara region, Mr. Vasyaev, formally presented him with the evidence against him (the so-called process of "familiarization with the criminal case"), this occurred in the absence of his first lawyer, Ms. Gordeeva. He submits that he and his lawyer were separately acquainted with the criminal file, despite the author having expressly requested that familiarization be carried out together with his lawyer. He states that this contravened article 49, part 5, of the Code of Criminal Procedure, as then in force, which made it obligatory for a lawyer to participate in the criminal proceedings in any case where the accused was charged with an offence for which the death penalty could be imposed. The author was charged inter alia with having committed a crime under article 102 of the Criminal Code (premeditated murder under aggravated circumstances), which was at the time punishable by the death penalty.

2.2 On an unspecified date, the author, together with other co-accused, complained about the above matter to the Criminal Division of the Saratov Regional Court and requested that his criminal case be returned for a supplementary investigation.[2] He also requested, inter alia, that he and his second lawyer, Ms. Abramova, be acquainted with all the case file materials, since Ms. Abramova had been retained by him only on 6 May 2000. On 12 May 2000, the Criminal Division of the Saratov Regional Court concluded that substantial violations of the criminal procedure law had been committed by the investigation authorities and that the case should be returned for a supplementary investigation to rectify the procedural deficiencies identified. The court specifically stated that in cases where a lawyer participates in criminal proceedings, the investigator should present all case file materials to the accused and his lawyer, unless the accused or his lawyer request to be acquainted with the case file separately.

2.3 The supplementary investigation was completed on 20 June 2000. The author submits that, contrary to the 12 May 2000 decision of the Criminal Division of the Saratov Regional Court, he was again familiarized with part of the case file materials in the absence of his lawyer. On an unspecified date in July 2000, the author's second lawyer, Ms. Abramova, successfully passed an examination to become a magistrate judge and could no longer act as defence attorney. Despite the author's numerous oral motions either to assign a new lawyer to him or to adjourn the familiarization with the case file,[3] the investigator in charge continued to formally present him with the case file in the absence of a lawyer. Specifically, on 18, 19, 20 and 21 July, the author was presented with parts of volumes 6 and 7, and with volumes 12, 13 and 14, of his case file in the absence of a lawyer. On 21 July 2000, the author's third lawyer, Mr. Nekhoroshev, was retained. On 24 July 2000, the author was familiarized with volume 15 of his case file separately from Mr. Nekhoroshev. In addition, the investigator did not present certain video evidence to the author, despite his numerous oral motions to view this together with his lawyer. Consequently, the author saw the said video evidence for the first time only during the court proceedings. Transcripts of the video were admitted by the court as evidence.

2.4 On 29 August 2000, during a trial hearing, the author complained about this matter to the Criminal Division of the Saratov Regional Court.[4] The author's third lawyer, Mr.

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[2] It transpires from the procedural decision of the Criminal Division of the Saratov Regional Court that the author's request was supported by the public prosecutor.

[3] Reference is made to article 49, part 4, of the Criminal Procedure Code.

[4] It transpires from the trial transcript that the composition of the Criminal Division of the Saratov Regional Court on 29 August 2000 was different from that of 12 May 2000.

Nekhoroshev, added that each of the preceding lawyers had represented his client at different stages of the proceedings and that he had acquainted himself with all case file materials, whereas the author had been presented only with part of the case file, in Mr. Nekhoroshev's absence. The author explained to the court that there should be a certificate dated 13 August 2000 in his case file confirming that his previous lawyer Ms. Abramova had successfully passed an examination to become a magistrate judge and that he had subsequently retained Mr. Nekhoroshev as his new defence counsel. The public prosecutor commented on the author's intervention and stated that there was no data confirming that the lawyer Ms. Abramova had indeed been appointed as a magistrate judge. The court adjourned the author's motion to be familiarized with the case file together with Mr. Nekhoroshev, pending verification of the information provided with regard to Ms. Abramova. Ultimately, the matter was never decided by the Criminal Division of the Saratov Regional Court.[5]

2.5 On 1 November 2000, the author was found guilty of premeditated murder under aggravated circumstances (art. 102 of the Criminal Code) and of three other charges under article 146 (2 and 3); article 126 (2), and article 148 (2), of the Criminal Code by the Saratov Regional Court and sentenced to 11 years' imprisonment. The author's cassation appeal was dismissed by the Criminal Division of the Supreme Court on 25 April 2001. His request for a review in the order of supervision to the Supreme Court was dismissed on 17 July 2003. The Supreme Court stated that it had not identified any violations of the procedural law which would provide grounds for altering the sentence handed down by the first instance court. The author's appeal of the 17 July 2003 decision of the Supreme Court was dismissed by the Deputy Chair of the Supreme Court on 12 November 2003.

The complaint

3.1 The author claims a violation of his rights under article 14, paragraph 3 (b) and (d), to have adequate time and facilities for the preparation of his defence, to communicate with counsel of his own choosing, and to have legal assistance assigned to him in any case where the interests of justice so require. The entire case file consisted of 19 volumes, many of which were over 200 pages. Pursuant to article 201, part 6, of the Criminal Procedure Code, as then in force, the investigator established a tight schedule, according to which the author was allocated only one day (four to five working hours a day) to familiarize himself with one of the volumes of the case file. After his second lawyer withdrew from the case, the author had to review certain volumes of the case file himself on 18, 19, 20, 21 and 24 July 2000. When the author subsequently retained another defence lawyer, he requested to be allowed to familiarize himself with the same case file materials once again in the presence of his lawyer, but this request was refused.

3.2 The author maintains that, in the absence of a lawyer, he could not obtain expert legal advice on the content of the case file materials immediately after familiarizing himself with them. Additionally, the author was unable to meet the tight schedule imposed by the investigator as he was not allowed to make copies of the case file but had to take notes by hand and, on 2 August 2000, had to sign a protocol for "completion of familiarization with the case file" without, in fact, having familiarized himself in full with all the prosecution evidence. The author noted in this protocol the number of volumes that he had reviewed in the lawyer's presence and the number of volumes that he had not seen at all. He claims that he was deprived of the right to obtain expert legal advice on the content of certain case file material prior to trial and of the opportunity to, jointly with his lawyer, in a timely manner, file motions on matters vital for his defence and for the determination of the case at trial

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[5] The information in this paragraph, including the fact that the motion was never decided by the court, is supported by the trial transcript presented by the author as evidence.

(for example, requesting to summon additional witnesses and appoint additional forensic experts). The author concludes that the violation of his right to defence had a negative impact on the legality and validity of his sentence, as he was denied the possibility to defend himself by all lawful means and methods.

State party's observations on merits

4.1 On 29 October 2008, the State party submits that the author's complaints regarding violations of his procedural rights to defence had been reviewed on numerous occasions by the Prosecutor General's Office and that no violations had been found. The State party also submits that his case had been reviewed by all court instances, including the Constitutional Court, and that neither of them had found a violation of his rights. It further submits that the author's contention that he had to acquaint himself with the case file in the absence of his lawyer is not consistent with the facts. According to a protocol of 21 June 2000, the accused was informed of the termination of the preliminary investigation and had his right to review the case file personally and together with his attorney explained to him in the presence of his lawyer, Ms. Abramova. The review of the case file by the author and his lawyer started on 22 June 2000. On 30 June 2000, the author was warned in writing by the investigating officer that it was unacceptable to protract the review of the case file. Since the investigating officer considered that the author was deliberately protracting the review, the investigating officer issued an order on 6 July 2000 giving the author a deadline of 28 July 2000 to acquaint himself with the case file. On 18 July 2000, the author requested to be represented by another lawyer, Mr. Nekhoroshev, and the review of the file continued accordingly with the participation of the above lawyer.

4.2 The State party further submits that on 29 August 2000 the court rejected the author's motion to return the case for additional investigation on the ground that his right to familiarize himself with the case file had been violated. Accordingly the State party maintains that there was no violation of the author's rights under article 14, paragraph 3 (d), of the Covenant.

Author's comments on the State party's observations

5. On 28 November 2008, the author submits that he started reviewing the case file and preparing his defence together with his lawyer Ms. Abramova on 22 June 2000. By way of preparation, they were making notes and copying the addresses of the prosecution witnesses and the interrogation protocols. On 30 June 2000, the investigator warned the author that it was unacceptable to protract the review of the case file. The author explained that he suffers from myopia and that a doctor had advised him to take 15-minute breaks from reading every hour, that copying protocols took time and that he had had no intention of protracting the case file review. Regardless of his explanations, on 6 July 2000, the investigator imposed a deadline of 28 July 2000 for reviewing the file. The author reiterates that he had one day to review, on average, 200 pages and that he could not manage to adequately prepare his defence in the short time allocated. He also reiterates that, on 29 August 2000, during the court hearing, he submitted a motion claiming that his right to acquaint himself with the case file in the presence of his lawyer had been violated, but that the court never ruled on that motion.

State party's further observations on the merits

6.1 On 9 June 2009, the State party submits that the author's submission of 28 November 2008 does not contain any new information. It further submits that the author's criminal case had been examined by the court and returned for additional investigation on two occasions and that the author had had two opportunities to familiarize himself with the case file, once between 1 February and 12 April 1999 and again between 6 January and 7

April 2000. The author was presented with the case file for a third time between 22 June 2000 and 28 July 2000. On that occasion the review of the case file began with one defence attorney and was completed with another, because the author refused the services of Ms. Abramova. The State party submits that the author's argument that on 13, 20, 21 and 24 July 2000 he reviewed case file materials without his lawyer(s) are contrary to the information contained in the schedule for review of the case file.[6]

6.2 Concerning the author's allegation that he was not given sufficient time to acquaint himself with the case file, the State party submits that according to article 201 of the Criminal Procedure Code that was in force at the time, the investigator had the right to issue a ruling, approved by the prosecutor, establishing a deadline for review of the case file should the accused and his counsel conspicuously protract the review. The State party maintains that the accused conspicuously protracted the review of the case file,[7] and that contrary to his submission on 29 August 2000 the court reviewed and rejected his motion that his right to familiarize himself with the case file had been violated.

Author's further submission

7. On 6 December 2009, the author presented to the Committee copies of the last page of the protocol on the completion of the review of the case file, parts of the schedule for case file review established by the investigator and parts of the investigator's ruling giving the author a deadline for review of the case file. The copy of the protocol presented by the author includes a note from him to the effect that he had not fully acquainted himself with the case file, that on 13, 20 and 21 July 2000 his defence attorney was not present and that he would like to review the video evidence together with his lawyer. A note from the lawyer, Mr. Nekhoroshev, reads that he had read the entire case file.

State party's further observations on the merits

8. On 13 August 2010, the State party reiterates its previous observations and submits that the schedule for review of the case file bears the signatures of both the author and his attorneys and that the above contradicts the note that he made at the end of the protocol on the completion of the review.

Issues and proceedings before the Committee

Consideration of admissibility

9.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

9.2 The Committee notes, as required by article 5, paragraph 2 (a), of the Optional Protocol, that the same matter is not being examined under any other procedure of international investigation or settlement.

9.3 The Committee notes that the State party did not raise any objections to the admissibility of the communication. The Committee declares the communication admissible insofar as it appears to raise issues under article 14, paragraphs 3 (b) and (d), of the Covenant, and proceeds to its consideration on the merits.

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[6] The State party maintains that according to the schedule on 13 July 2000 the author and his first lawyer reviewed volume 11 of the case file, that on 20, 21 and 24 July 2000 the author and his second lawyer reviewed volumes 12, 14 and 15 of the case file and that the above was evidenced by the signatures of the author and his lawyers. No copy of the schedule is presented by the State party.

[7] The State party submits that on 26, 27, 28, 29 and 30 June the author reviewed 22, 9, 16 and 31 pages respectively and that over the next four days he reviewed 26, 68, 18 and 2 pages respectively.

Consideration of the merits

10.1 The Human Rights Committee has considered this communication in the light of all the information received, in accordance with article 5, paragraph 1, of the Optional Protocol.

10.2 The Committee takes note of the author's allegations that he did not have adequate time and facilities for the preparation of his defence and could not communicate with counsel of his own choosing, since he was mandated to review the entire case file, consisting of 19 volumes (over 4,000 pages), in 37 days, did not manage to review all case materials and was not allowed to familiarize himself with certain case file materials in the presence of his attorney(s). The Committee also notes the State party's observation that the author's allegations that he had to review parts of the case file in the absence of his defence attorney were contradicted by his and his lawyer's signatures on the case file review schedule. The Committee, however, observes that the author had made a note stating that he had not managed to review the entire case file at the end of the case file review schedule. The Committee also observes that from the transcript of the trial hearing of 29 August 2000 in the Saratov Regional court it transpires that the author's lawyer confirmed the author's allegations that the latter had not had sufficient time to review the entire case file.

10.3 The Committee recalls that paragraph 3 (b) of article 14 provides that accused persons must have adequate time and facilities for the preparation of their defence and to communicate with counsel of their own choosing. This provision is an important element of the guarantee of a fair trial and an application of the principle of equality of arms.[8] The Committee further notes that, in its 12 May 2000 decision, the State party's Saratov Regional Court had ruled that the fact that the author was presented with certain case materials in the absence of his defence lawyer constituted a violation of the domestic criminal procedure and for that reason returned the case for additional investigation. The Committee also notes that from the transcript of the subsequent trial it appears that the same court had failed to rule on an identical motion and proceeded to convict the author. The Committee further notes the State party's submission that the court had rejected the above motion, but did not submit documentary evidence in support of its contention.

10.4 The Committee observes that the author was not provided with the opportunity to make copies of the case file materials and that the limited time granted for review did not allow him to take notes by hand. Furthermore, he did not have the opportunity to review parts of the case file at all, including video evidence that he saw for the first time during the trial. The Committee also notes that on 13, 20 and 21 July 2000, the author was denied the opportunity to review certain case files in the presence of his lawyer, as he was entitled to under domestic procedure law. Taking into consideration the seriousness of the charges against the author, one of which was punishable by death at the time of the proceedings, the Committee considers that the author was not provided with adequate time and facilities for the preparation of his defence and that his rights under article 14, paragraph 3 (b) of the Covenant have thus been violated.

10.5 In the light of the above finding, the Committee decides not to examine the author's claim of a violation of article 14, paragraph 3 (d), of the Covenant.

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[8] Human Rights Committee general comment No. 32 on the right to equality before courts and tribunals and to a fair trial, para. 32, *Official Records of the General Assembly, Sixty-second Session, Supplement No. 40*, vol. I (A/62/40 (Vol. I)), annex VI.

11. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation by the State party of the author's rights under article 14, paragraph 3 (b), of the Covenant.

12. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including adequate and appropriate compensation. The State party is also under an obligation to take steps to prevent similar violations occurring in the future.

13. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when it has been determined that a violation has occurred, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views and to have them widely disseminated in the official language of the State party.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

E. Communication No. 1796/2008, *Zerrougui v. Algeria* (Views adopted on 25 July 2013, 108th session)[*]

Submitted by:	Ahmed Zerrougui (represented by Track Impunity Always (TRIAL))
Alleged victims:	Benattia Zerrougui (the author's brother) and the author
State party:	Algeria
Date of communication:	18 June 2008 (initial submission)
Subject matter:	Enforced disappearance
Procedural issue:	Exhaustion of domestic remedies
Substantive issues:	Right to life, prohibition of torture and cruel or inhuman treatment, right to liberty and security of person, respect for the inherent dignity of the human person, recognition as a person before the law and right to an effective remedy
Articles of the Covenant:	Articles 2 (para. 3), 6 (para. 1), 7, 9 (paras. 1–4), 10 (para. 1) and 16
Article of the Optional Protocol:	Article 5 (para. 2 (b))

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 25 July 2013,

Having concluded its consideration of communication No. 1796/2008, submitted to the Human Rights Committee by Ahmed Zerrougui under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

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[*] The following members of the Committee participated in the consideration of the communication: Mr. Yadh Ben Achour, Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Walter Kälin, Ms. Zonke Zanele Majodina, Mr. Kheshoe Parsad Matadeen, Mr. Gerald L. Neuman, Sir Nigel Rodley, Mr. Victor Manuel Rodríguez-Rescia, Mr. Fabián Omar Salvioli, Ms. Anja Seibert-Fohr, Mr. Yuval Shany, Mr. Konstantine Vardzelashvili and Ms. Margo Waterval.

Pursuant to rule 90 of the Committee's rules of procedure, Committee member Mr. Lazhari Bouzid did not take part in the examination of the communication.

The text of an individual opinion by Mr. Salvioli and Mr. Rodríguez-Rescia is appended to the present Views.

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The author of the communication is Ahmed Zerrougui. He states that his brother, Benattia Zerrougui, was the victim of violations by Algeria of his rights under article 2 (para. 3), article 6 (para. 1), article 7, article 9 (paras. 1 to 4), article 10 (para. 1) and article 16 of the International Covenant on Civil and Political Rights. The author also considers himself to be a victim of violations of article 2, paragraph 3, and article 7 of the Covenant. He is represented by counsel.

1.2 On 1 July 2008, in accordance with rule 92 of its rules of procedure, the Committee, acting through the Special Rapporteur on new communications and interim measures, asked the State party not to take any measures likely to impede the author and his family from exercising their right to submit an individual complaint to the Committee. The State party was therefore asked not to invoke its national law, notably Ordinance No. 06-01 implementing the Charter for Peace and National Reconciliation, against the author or members of his family.

1.3 On 12 March 2009, the Committee, through the Special Rapporteur on new communications and interim measures, decided not to consider the admissibility and the merits of the communication separately.

The facts as submitted by the author

2.1 Benattia Zerrougui was first arrested by the police on 11 February 1992, while he was serving as secretary-general of the elected municipal council of Tiaret. The author's brother suffered a great deal of abuse during his interrogation (slaps, blows with the butt of a rifle) at the hands of a police officer. When he was brought before the tribunal of Tiaret, he was sentenced to 4 months' imprisonment.

2.2 On 1 June 1995, towards midday, Benattia Zerrougui arrived at Tiaret taxi station from the town of Oran, where he was working as a merchant. His brother Ahmed, the author of the communication, was waiting for him at the station. Benattia Zerrougui was arrested there by armed and hooded police officers wearing the uniform of the *wilaya* (governorate) security services, who had set up a roadblock. They then took him to the police station a few hundred metres away.

2.3 The author informed their mother, who hurried to the police station. She went there almost every day for 15 days in search of her son. On 15 June 1995, a police officer confirmed that her son was still being held there. She asked him about her son's health. As the police officer was preparing to take her to see the victim, a senior officer prevented him from doing so, definitively barring any contact between arrested persons and their relatives. Each time that the mother went to the police station after that, she was told that her son was not being held there.

2.4 The family was able to get news of the detainee through a police officer who was a former schoolmate of the arrested man and a woman employee at the police station. It seems that he was hospitalized on two occasions in Youcef Damerdji Hospital in Tiaret. A medical technician at the hospital also confirmed that the victim had been there. On 19 July 1995, the same police officer informed the family that the military security services had transferred Benattia Zerrougui to the Tiaret *wilaya* military sector.

2.5 The family was also in contact with a military police officer who had managed to locate the prisoner in Tiaret and who also said he had seen the arrest report. He gave the family information about Benattia Zerrougui's situation from time to time, particularly when he was transferred from one place of detention to another. In June 1996, the officer apparently even met with him in person. At the end of 1998, the family learned from a source within the Tiaret military sector that their son had been transferred to the Eckmühl military police secret detention centre in Oran. In 1999, he was again transferred to Tiaret. In June 1999, a member of the security services confirmed to the family that Benattia Zerrougui was still being held incommunicado in the Tiaret military sector, and in November 2000 a former inspector of police told them that he had once again been transferred to Oran, without saying, however, exactly where he was being held. According to the information that the family has been able to gather, between 1995 and 2000 Benattia Zerrougui was detained most of the time in the Tiaret military sector, apart from when he was held in Oran. However, his family never received confirmation of that unofficial information from the authorities.

2.6 During 1995, Benattia Zerrougui's wife and mother wrote several letters to various institutions. His wife applied in writing to the head of the Tiaret *wilaya* police department on 24 June 1995, and his mother applied to the president of the tribunal of Tiaret on 15 October 1995, asking for information about the situation and particularly about where the victim was being held. There has been no response to these letters. In January 1996, the victim's mother and the author of the communication went to the National Human Rights Observatory in Algiers and filed an application concerning Benattia Zerrougui's disappearance. They never received any response, despite reminders from his mother, who filed another application on the subject in the *wilaya* office in 1998.

2.7 On 12 May 1997, the victim's mother submitted a request for assistance to the Ombudsman. The Ombudsman's response indicated that the matter had come to his attention and that measures would be taken. On 16 August 1998, having not received any further news, the victim's mother wrote to the public prosecutor to ask where her son was being held and why he had never been brought before a court. She was summoned by the police services on several different occasions in 1998. However, after explaining the circumstances of her son's arrest, she did not receive any response. From 1998 onward, she was summoned several times to the headquarters of the Dark Al Watani brigade in Tiaret, including on 4 October 1998 and 24 November 2000. She explained the circumstances of her son's arrest but did not receive any response.

2.8 The victim's mother wrote to the chief prosecutor on 4 September 2000 and to the public prosecutor on 8 April 2001 asking them to find her son. She also wrote to the Office of the President of the Republic. The latter, in two letters dated 4 May and 14 July 2004, informed her that her letters, dated 27 March and 29 May 2004, had been transmitted to the National Advisory Commission for the Promotion and Protection of Human Rights, the successor to the National Human Rights Observatory. However, the family has never been informed of any action taken and has never received an answer from the Commission.

2.9 The victim's mother finally retained a lawyer to file a complaint with the public prosecutor of the tribunal of Tiaret in which she asked to have her son located; the complaint was lodged on 21 December 2004 but the family has never received a response. However, as a result of these complaints, persons claiming to be members of the security services did come to the family home on several occasions to ask the victim's mother to acknowledge, in writing, that her son had joined up with armed groups; she refused to do so.

2.10 The author argues that it has been impossible for him to have recourse to any judicial remedy before a court of law since the enactment of Ordinance No. 06-01 of 27 February 2006 implementing the Charter for Peace and National Reconciliation, adopted by referendum on 29 September 2005, which bars any judicial action against members of the Algerian defence and security services in the context of the events that took place in the country from 1993 to 1998. In addition, the State authorities' silence and their denial of the facts mean that there are no available and effective remedies to be exercised before State institutions.

The complaint

3.1 The author claims that his brother became a victim of enforced disappearance on 1 June 1995. He invokes article 7, paragraph 2 (i), of the Rome Statute of the International Criminal Court and article 2 of the International Convention for the Protection of All Persons from Enforced Disappearance.

3.2 He considers that, as 13 years have passed since his brother's disappearance at a secret detention centre, there is very little hope of finding him alive. His brother's prolonged absence, together with the circumstances surrounding his arrest, suggest that he died in detention. Incommunicado detention entails a high risk that the right to life may be violated. The threat posed to a victim's life at the time of an enforced disappearance constitutes a violation of article 6 of the Covenant insofar as the State party has not fulfilled its duty to protect the fundamental right to life. The State has, moreover, not fulfilled its duty to guarantee the right to life, in that it has made no effort to conduct an effective investigation into what happened to the victim.

3.3 As regards the victim, the mere fact of being subjected to enforced disappearance constitutes inhuman or degrading treatment. The anguish and the suffering caused by indefinite detention without contact with the person's family or the outside world constitute treatment in breach of article 7 of the Covenant.

3.4 The victim was arrested by two police officers, without a warrant and without being informed of the reasons for his arrest, in violation of his rights under article 9, paragraphs 1 and 2, of the Covenant. Furthermore, he was not brought promptly before a judge or other judicial authority, which should not take longer than a few days, while incommunicado detention can itself lead to a violation of article 9, paragraph 3. As a victim of enforced disappearance, he was not physically able to appeal against the legality of his detention, or to apply to a judge to obtain his release, nor even to ask a third party who was at liberty to take over his defence, which is in violation of article 9, paragraph 4.

3.5 If it is established that he has been the victim of a violation of article 7, it can no longer be argued that he was ever treated in a humane manner or with respect for the inherent dignity of the human person in accordance with article 10, paragraph 1, of the Covenant.

3.6 As a victim of unacknowledged detention, the author's brother was reduced to the status of a non-person, in violation of article 16 of the Covenant.

3.7 As a victim of enforced disappearance, Benattia Zerrougui has been prevented from exercising his right to a remedy that would allow him to challenge the lawfulness of his detention, in violation of article 2, paragraph 3, of the Covenant. His family has used all legal means to find out the truth about his fate but received no response.

3.8 The author of the communication believes himself to be the victim of a violation of his rights under article 7 of the Covenant in that the disappearance of his brother constitutes a paralysing, painful and distressing ordeal.

State party's observations on admissibility

4.1 On 3 March 2009, the State party, in a background memorandum on the inadmissibility of communications submitted to the Human Rights Committee in connection with the implementation of the Charter for Peace and National Reconciliation, contested the admissibility of the communication and of 10 other communications submitted to the Committee. The State party is of the view that communications incriminating public officials, or persons acting on behalf of public authorities, in cases of enforced disappearance during the period in question — from 1993 to 1998 — should be considered within the broader context of the sociopolitical and security conditions that prevailed in the country during a period when the Government was struggling to combat a form of terrorism aimed at bringing about the "collapse of the Republican State". In this context, and in accordance with the Constitution (arts. 87 and 91), protective measures were taken and the Algerian Government notified the United Nations Secretariat that it had declared a state of emergency, in accordance with article 4, paragraph 3, of the Covenant.

4.2 During that period, the Government had to fight against groups that were not formally organized. As a result, there was some confusion in the manner in which a number of operations were carried out among the civilian population, and it was difficult for civilians to distinguish between the actions of terrorist groups and those of the security forces, to whom civilians often attributed enforced disappearances. Hence, according to the State party, while enforced disappearances may be due to many causes, they cannot be blamed on the Government. According to a variety of independent sources, including the press and human rights organizations, it may be concluded that the concept of disappearances in Algeria during the period in question covers six possible scenarios, none of which can be blamed on the State. The first scenario concerns persons who were reported missing by their relatives but who in fact had chosen to go into hiding in order to join an armed group and who instructed their families to report that they had been arrested by the security services as a way of "covering their tracks" and avoiding being "harassed" by the police. The second scenario concerns persons who were reported missing after their arrest by the security services but who took advantage of their subsequent release to go into hiding. The third scenario concerns persons abducted by armed groups which, because they were not identified or because they had stolen uniforms or identification documents from police officers or soldiers, were mistakenly thought to belong to the Armed Forces or security services. The fourth scenario concerns persons reported missing who had abandoned their families, and in some cases even left the country, because of personal problems or family disputes. The fifth scenario concerns persons reported missing by their family but who were in fact wanted terrorists who had been killed and buried in the maquis following factional infighting, doctrinal disputes or arguments over the spoils of war among rival armed groups. The sixth scenario mentioned by the State party concerns persons reported missing who were actually living in Algeria or abroad under a false identity provided by a network of document forgers.

4.3 The State party maintains that it was in view of the diversity and complexity of the situations covered by the general concept of disappearance that the Algerian legislature, following the referendum on the Charter for Peace and National Reconciliation, recommended a comprehensive approach to the issue of disappeared persons, whereby all persons who had disappeared in the context of the "national tragedy" would be dealt with, all victims would be offered support to overcome their ordeal and all victims of disappearance and their beneficiaries would be entitled to redress. According to statistics from the Ministry of the Interior, 8,023 cases of disappearance have been reported, 6,774 cases have been examined, 5,704 have been approved for compensation and 934 rejected, with 136 still pending. A total of 371,459,390 Algerian dinars has been paid out as compensation to all the victims concerned. In addition, a total of 1,320,824,683 dinars has been paid out in monthly pensions.

4.4 The State party further contends that not all domestic remedies have been exhausted. It stresses the importance of distinguishing between simple formalities involving the political or administrative authorities, non-judicial remedies pursued through advisory or mediation bodies, and judicial remedies pursued through the relevant courts of justice. The State party observes that, as may be seen from the authors' statements,[1] the complainants have written letters to political and administrative authorities, petitioned advisory or mediation bodies and petitioned representatives of the prosecution service (chief prosecutors and public prosecutors), but have not, strictly speaking, initiated legal action and seen it through to its conclusion by availing themselves of all available remedies of appeal and judicial review. Of all these authorities, only the representatives of the prosecution service are authorized by law to open a preliminary inquiry and refer a case to the investigating judge. In the Algerian legal system, it is the public prosecutor who receives complaints and who institutes criminal proceedings, if these are warranted. Nevertheless, in order to protect the rights of victims or their beneficiaries, the Code of Criminal Procedure authorizes the latter to sue for damages by filing a complaint with the investigating judge. In this case, it is the victim, not the prosecutor, who initiates criminal proceedings by bringing the matter before the investigating judge. This remedy, which is provided for in articles 72 and 73 of the Code of Criminal Procedure, was not utilized, despite the fact that it would have enabled the victims to institute criminal proceedings and compel the investigating judge to initiate proceedings, even if the prosecution service had decided otherwise.

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[1] As the State party has provided a reply to 11 different communications, it refers to the "authors", which includes the author of the present communication.

4.5 The State party also notes the author's contention that the adoption by referendum of the Charter for Peace and National Reconciliation and its implementing legislation — in particular, article 45 of Ordinance No. 06-01 — rules out the possibility that any effective and available domestic remedies exist in Algeria to which the families of victims of disappearance could have recourse. On this basis, the author believed he did not need to bring the matter before the relevant courts, in view of the latter's likely position and findings regarding the application of the ordinance. However, the author cannot invoke this ordinance and its implementing legislation as a pretext for failing to institute the legal proceedings available to him. The State party recalls the Committee's jurisprudence to the effect that a person's subjective belief in, or presumption of, the futility of a remedy does not exempt that person from the requirement to exhaust all domestic remedies.[2]

4.6 The State party then turns its attention to the nature, principles and content of the Charter for Peace and National Reconciliation and its implementing legislation. It maintains that, in accordance with the principle of the inalienability of peace, which has become an international right to peace, the Committee should support and consolidate peace and encourage national reconciliation with a view to strengthening States affected by domestic crises. As part of this effort to achieve national reconciliation, the State party adopted the Charter, and its implementing ordinance prescribes legal measures for the discontinuance of criminal proceedings and the commutation or remission of sentences for any person who is found guilty of acts of terrorism or who benefits from the provisions of the legislation on civil dissent, except for persons who have committed or been accomplices in mass killings, rapes or bombings in public places. This ordinance also provides for a procedure for filing an official finding of presumed death, which entitles beneficiaries to receive compensation as victims of the "national tragedy". Social and economic measures have also been put in place, including the provision of employment placement assistance and compensation for all persons considered victims of the "national tragedy". Finally, the ordinance prescribes political measures, such as a ban on holding political office for any person who exploited religion in the past in a way that contributed to the "national tragedy", and establishes the inadmissibility of any proceedings brought against individuals or groups who are members of any branch of Algeria's defence and security forces for actions undertaken to protect persons and property, safeguard the nation and preserve its institutions.

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[2] The State party cites in particular communications Nos. 210/1986 and 225/1987, *Pratt and Morgan v. Jamaica*, Views adopted on 6 April 1989.

4.7 In addition to the establishment of a fund to compensate all victims of the "national tragedy", the sovereign people of Algeria have, according to the State party, agreed to a process of national reconciliation as the only way to heal the wounds inflicted. The State party insists that the proclamation of the Charter for Peace and National Reconciliation reflects a desire to avoid confrontation in the courts, media outpourings and political score settling. The State party is therefore of the view that the author's allegations are covered by the comprehensive domestic settlement mechanism provided for in the Charter.

4.8 The State party asks the Committee to note how similar the facts and situations described by the author are and to take into account the sociopolitical and security context in which they occurred; to find that the author failed to exhaust all domestic remedies; to recognize that the authorities of the State party have established a comprehensive domestic mechanism for processing and settling the cases referred to in these communications through measures aimed at achieving peace and national reconciliation consistent with the principles of the Charter of the United Nations and subsequent covenants and conventions; to find the communication inadmissible; and to request that the author seek an alternative remedy.

State party's additional observations on admissibility

5.1 On 9 October 2009, the State party transmitted a further memorandum to the Committee, in which it raises the question of whether the submission of a series of individual communications might not actually amount to an abuse of procedure aimed at bringing before the Committee a broad historical issue involving causes and circumstances of which the latter is unaware. The State party observes in this connection that these "individual" communications dwell on the general context in which the disappearances occurred and focus solely on the actions of the security forces, never mentioning those of the various armed groups that used criminal concealment techniques to incriminate the Armed Forces.

5.2 The State party insists that it will not address the merits of these communications until the issue of their admissibility has been settled, since all judicial or quasi-judicial bodies have a duty to deal with preliminary questions before considering the merits. According to the State party, the decision in the cases in point to consider questions of admissibility and the merits jointly and simultaneously — aside from the fact that it was not arrived at on the basis of consultation — seriously prejudices the proper consideration of the communications in terms of both their general nature and their intrinsic particularities. Referring to the Committee's rules of procedure, the State party notes that the sections relating to the Committee's procedure to determine the admissibility of communications are separate from those relating to the consideration of communications on the merits, and that therefore these questions could be considered separately. Concerning the exhaustion of domestic remedies, the State party stresses that the author did not use channels that would have allowed consideration of the case by the Algerian judicial authorities for any of the complaints or requests for information he submitted.

5.3 Recalling the Committee's jurisprudence regarding the obligation to exhaust domestic remedies, the State party stresses that mere doubts about the prospect of success or concerns about delays do not exempt the author from the obligation to exhaust these remedies. As to the question of whether the promulgation of the Charter for Peace and National Reconciliation has barred the possibility of appeal in this area, the State party replies that the failure by the author to submit his allegations to examination has so far prevented the Algerian authorities from taking a position on the scope and limitations of the applicability of the Charter. Moreover, under the ordinance in question, the only proceedings that are inadmissible are those brought against "members of any branch of the defence and security forces of the Republic" for actions consistent with their core duties to the Republic, namely, to protect persons and property, safeguard the nation and preserve its institutions. On the other hand, any allegations concerning actions attributable to the defence or security forces that can be proved to have taken place in any other context are subject to investigation by the appropriate courts.

5.4 In a note verbale of 6 October 2010, the State party reiterates, in extenso, its objections regarding admissibility, which it had already submitted on 3 March 2009 and 9 October 2009 (see paras. 4.1 and 5.1).

Author's comments on the State party's submission

6.1 On 30 September 2011, the author submitted comments on the State party's observations and provided additional arguments on the merits. He points out that the State party has recognized the competence of the Committee to consider individual communications. This competence is of a general nature, and its exercise by the Committee is not subject to the discretion of the State party. In particular, it is not for the State party to determine whether it is appropriate for the Committee to take up a specific case. That is for the Committee to decide when it considers the communication. Referring to article 27 of the Vienna Convention on the Law of Treaties, the author considers that the State party's adoption of domestic legislative and administrative measures to support the victims of the "national tragedy" cannot be invoked at the admissibility stage to prevent individuals subject to its jurisdiction from using the procedure provided for under the Optional Protocol. Even if such measures might have an impact on the settlement of a dispute, they must be studied with regard to the merits of the communication and not at the admissibility stage. In the present case, the legislative measures themselves amount to a violation of the rights enshrined in the Covenant, as the Committee has previously observed.[3]

6.2 The author recalls that the State party's establishment of the state of emergency on 9 February 1992 does not affect the right of persons to submit individual communications to the Committee. Article 4 of the Covenant allows for derogations only from certain provisions of the Covenant during states of emergency, but does not affect the exercise of rights under the Optional Protocol. According to the author, the State party's observations on the appropriateness of the communication do not constitute a valid ground for inadmissibility.

6.3 The author also refers to the State party's argument that the requirement to exhaust domestic remedies calls on the author to institute criminal proceedings by filing a complaint with the investigating judge, in accordance with articles 72 et seq. of the Code of Criminal Procedure. He refers to an individual communication concerning the State party, in which the Committee stated that "the State party has a duty not only to carry out thorough investigations of alleged violations of human rights, particularly enforced disappearances or violations of the right to life, but also to prosecute, try and punish anyone held to be responsible for such violations. To sue for damages for offences as serious as those alleged in the present case cannot be considered a substitute for the charges that should be brought by the public prosecutor."[4] The author therefore considers that, given the serious nature of the alleged offences, it was the responsibility of the competent authorities to take up the case. However, no action was taken, even though members of Benattia Zerrougui's family had been trying from the date of his arrest by the Tiaret police on 1 June 1995 to make enquiries concerning his whereabouts, to no avail.

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[3] The author refers to the concluding observations of the Human Rights Committee on the third periodic report of Algeria, adopted on 1 November 2007 (CCPR/C/DZA/CO/3), paras. 7, 8 and 13. He also refers to communication No. 1588/2007, *Benaziza v. Algeria*, Views adopted on 26 July 2010, para. 9.2, and communication No. 1196/2003, *Boucherf v. Algeria*, Views adopted on 30 March 2006, para. 11. The author also refers to the concluding observations of the Committee against Torture on the third periodic report of Algeria, adopted on 13 May 2008 (CAT/C/DZA/CO/3), paras. 11, 13 and 17. Lastly, he cites general comment No. 29 (2001) on derogations from the Covenant during states of emergency, para. 1 (*Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 40, Vol. I* (A/56/40 (Vol. I)), annex VI).

6.4 Between 1995 and 2000, the family never received any official information about Benattia Zerrougui's fate. All the information obtained was from unofficial sources. They thus found out that he had spent 19 days in custody at Tiaret police station before being detained incommunicado in the Tiaret military sector. Immediately after the arrest, his mother had gone to Tiaret police station, but was not able to elicit any information. She appealed to the public prosecutor of the tribunal of Tiaret and the chief prosecutor of the court of Tiaret. It was not until three years later, after many reminders from several members of the family, that the gendarmerie summoned the victim's mother to take her statement. At the same time, the victim's wife and mother sought help by writing to various authorities such as the Ombudsman, the Head of Government, the President of the Republic, the Minister of the Interior, the Minister of Justice and the National Human Rights Observatory, with no result. The author therefore cannot be accused of failing to exhaust all remedies on the ground that he did not sue for damages by filing a complaint with the investigating judge concerning such a grave human rights violation, which the State party should not have ignored.

6.5 As to the State party's argument that mere "subjective belief or presumption" does not exempt the author of a communication from the requirement to exhaust all domestic remedies, the author cites article 45 of Ordinance No. 06-01, whereby legal proceedings may not be brought against individuals or groups who are members of any branch of the defence or security forces. Any person making such a complaint or allegation is liable to a term of imprisonment of 3 to 5 years and a fine of between 250,000 and 500,000 dinars. The State party has therefore not convincingly demonstrated how suing for damages would have enabled the competent courts to receive and investigate complaints, as that would involve violating article 45 of the ordinance, or how the author of a complaint could have been guaranteed immunity from prosecution under article 46 of the ordinance. As treaty body jurisprudence confirms, a reading of these provisions leads to the conclusion that any complaint regarding the violations suffered by the author and his brother would be not only declared inadmissible, but also treated as a criminal offence. The author notes that the State party fails to provide an example of any case which, despite the existence of the above-mentioned ordinance, has led to the effective prosecution of the perpetrators of human rights violations in a similar case. The author concludes that the remedies mentioned by the State party are futile.

6.6 With respect to the merits of the communication, the author notes that the State party has simply listed a number of scenarios according to which the victims of the "national tragedy" in general terms might have disappeared. Such general comments do not refute the allegations made in the present communication. In fact, similar comments have been put forward in a number of other cases, which shows the State party's continuing unwillingness to consider such cases individually.

6.7 With regard to the State party's argument that it is entitled to request that the admissibility of the communication be considered separately from the merits, the author refers to rule 97, paragraph 2, of the Committee's rules of procedure, which states that the working group or special rapporteur may, because of the exceptional nature of the case, request a written reply that relates only to the question of admissibility. Consequently, it is not for the author of the communication or the State party to take such decisions, which are the sole prerogative of the working group or special rapporteur. The author considers that the present case is no different from other cases of enforced disappearance and that admissibility should not be considered separately from the merits.

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[4] Communication No. 1588/2007, *Benaziza v. Algeria*, Views adopted on 26 July 2010, para. 8.3.

6.8 The author points out that the State party is required to submit "explanations or statements that shall relate both to the communication's admissibility and its merits". He also refers to the jurisprudence of the treaty bodies, which consider that, in the absence of statements on the merits by the State party, the Committee may decide on the basis of the information in the case file. The many reports on the actions of the security forces during the period in question and the many steps taken by the victim's family members corroborate the allegations made by the author in his communication. In view of the State party's involvement in the disappearance of his brother, the author is unable to provide additional information in support of his communication, as that information is entirely in the hands of the State party. The author also notes that the lack of any statements by the State party regarding the merits of the case is tantamount to an acknowledgement by the State party that violations were committed.

Issues and proceedings before the Committee

Consideration of admissibility

7.1 First of all, the Committee wishes to point out that the decision by the Special Rapporteur to examine the admissibility and the merits jointly (see paragraph 1.3 above) does not preclude their being considered separately by the Committee. The joint consideration of the admissibility and the merits does not mean they must be examined simultaneously. Consequently, before considering any claim contained in a communication, the Committee must decide, in accordance with rule 93 of its rules of procedure, whether the communication is admissible under the Optional Protocol.

7.2 Under article 5, paragraph 2 (a), of the Optional Protocol, the Committee must ascertain that the same matter is not being examined under another procedure of international investigation or settlement. The Committee notes that the disappearance of Benattia Zerrougui was reported to the Working Group on Enforced or Involuntary Disappearances. However, it recalls that extra-conventional procedures or mechanisms established by the Commission on Human Rights or the Human Rights Council to examine and report publicly on human rights situations in specific countries or territories or cases of widespread human rights violations in the world do not generally constitute an international procedure of investigation or settlement within the meaning of article 5, paragraph 2 (a), of the Optional Protocol.[5] Accordingly, the Committee considers that the examination of Benattia Zerrougui's case by the Working Group on Enforced or Involuntary Disappearances does not render it inadmissible under this provision.

7.3 The Committee notes that, in the State party's view, the author and his family have not exhausted domestic remedies, since they did not consider bringing up the matter with the investigating judge and suing for damages in criminal proceedings under articles 72 and 73 of the Code of Criminal Procedure. The Committee also notes that, according to the State party, the author wrote letters to political and administrative authorities and petitioned representatives of the prosecution service (chief prosecutors and public prosecutors), but has not, strictly speaking, initiated legal action and seen it through to its conclusion by availing himself of all available remedies of appeal and judicial review. The Committee notes the author's argument that his mother went to Tiaret police station to ask for news of the victim and also appealed to the public prosecutor of the tribunal of Tiaret and the chief prosecutor of the court of Tiaret, but that it was not until three years later, after numerous reminders from different members of the family, that the gendarmerie summoned the victim's mother to take her statement, with no result. It further notes that the victim's wife and mother also wrote to various national authorities, including the Ombudsman, the Head of Government, the President of the Republic, the Minister of the Interior, the Minister of Justice and the National Human Rights Observatory; and his mother also retained a lawyer at the Supreme Court to file a complaint with the public prosecutor of the tribunal of Tiaret. The Committee also notes that no proceedings or investigations were initiated as the result of all these efforts and that the author, despite the administrative and judicial actions undertaken, has not been able to obtain any official information that could clarify the fate of his brother. Furthermore, the Committee takes note of the author's argument that Ordinance No. 06-01 prohibits, under penalty of criminal prosecution, the initiation of legal proceedings against any member of the defence or security forces and thereby frees victims of the obligation to exhaust domestic remedies.

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[5] See, for example, communication No. 1779/2008, *Mezine v. Algeria*, Views adopted on 25 October 2012, para. 7.2; communication No. 1781/2008, *Berzig v. Algeria*, Views adopted on 31 October 2011, para. 7.2; and communication No. 540/1993, *Atachahua v. Peru*, Views adopted on 25 March 1996, para. 7.1.

7.4 The Committee recalls that the State party has a duty not only to carry out thorough investigations of alleged violations of human rights brought to the attention of its authorities, particularly enforced disappearances or violations of the right to life, but also to prosecute, try and punish anyone held to be responsible for such violations.[6] The family of Benattia Zerrougui has repeatedly contacted the competent authorities concerning his disappearance, but the State party has failed to conduct a thorough and effective investigation into the disappearance of the author's brother, despite the fact that serious allegations of enforced disappearance were involved. The State party has also failed to provide sufficient evidence that an effective remedy is available, since Ordinance No. 06-01 of 27 February 2006 continues to be applicable despite the Committee's recommendations that it should be brought into line with the Covenant (CCPR/C/DZA/CO/3, paras. 7, 8 and 13). The Committee is of the view that suing for damages for offences as serious as those alleged in the present case cannot be considered a substitute for the charges that should be brought by the public prosecutor.[7] Moreover, given the vague wording of articles 45 and 46 of the ordinance and, in the absence of satisfactory information from the State party about their interpretation and actual enforcement, the author's fears regarding the effectiveness of filing a complaint are reasonable.

7.5 The Committee considers that, for the purposes of admissibility of a communication, the author must exhaust only the effective remedies for addressing the alleged violation, which in the present case consist of the effective remedies for addressing the enforced disappearance. In the light of all these considerations, the Committee concludes that article 5, paragraph 2 (b), of the Optional Protocol is not an obstacle to the admissibility of the present communication.

7.6 The Committee finds that the author has sufficiently substantiated his allegations insofar as they raise issues under article 6 (para. 1), article 7, article 9, article 10, article 16 and article 2 (para. 3) of the Covenant and therefore proceeds to consider the communication on the merits.

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[6] See, for example, communication No. 1791/2008, *Boudjemai v. Algeria*, Views adopted on 22 March 2013, para. 7.4.

[7] See, for example, *Boudjemai v. Algeria*, para. 7.4.

Consideration of the merits

8.1 The Committee has considered the present communication in the light of all the information made available to it by the parties, as required under article 5, paragraph 1, of the Optional Protocol.

8.2 The State party has provided general and collective comments on the serious allegations made by the authors of several communications, including the author of the present communication. The State party has been content to argue that communications incriminating public officials or persons acting on behalf of public authorities in cases of enforced disappearances from 1993 to 1998 should be considered within the broader context of the sociopolitical and security conditions that prevailed in the country during a period when the Government was struggling to combat terrorism. The Committee refers to its jurisprudence[8] and recalls that the State party may not invoke the provisions of the Charter for Peace and National Reconciliation against persons who invoke provisions of the Covenant or who have submitted or may submit communications to the Committee. The Covenant requires the State party to show concern for the fate of each individual and to treat each person with respect for the inherent dignity of the human person. Ordinance No. 06-01, without the amendments recommended by the Committee, appears to promote impunity and therefore cannot, as it currently stands, be considered compatible with the provisions of the Covenant.

8.3 The Committee notes that the State party has not replied to the author's allegations concerning the merits of the case, and recalls its jurisprudence[9] according to which the burden of proof should not rest solely on the author of a communication, especially given that the author and the State party do not always have the same degree of access to evidence and that often only the State party holds the necessary information. Article 4, paragraph 2, of the Optional Protocol indicates that the State party has the duty to investigate in good faith all allegations of violations of the Covenant made against it and its representatives and to provide the Committee with the information available to it. In the absence of explanations from the State party in this respect, due weight must be given to the author's allegations, provided they have been sufficiently substantiated.

8.4 The Committee notes that, according to the author, his brother, Benattia Zerrougui, was arrested on 1 June 1995 around midday by armed and hooded police officers wearing the uniform of the *wilaya* security services, who had set up a roadblock, and that the author was present during the arrest. The Committee also notes that, according to the author, the prolonged absence of his brother, as well as the circumstances surrounding his arrest, strongly suggest that he died in detention. The Committee notes that the State party has produced no evidence refuting such an allegation. The Committee recalls that, in cases of enforced disappearance, the deprivation of liberty, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate of the disappeared person, removes the person from the protection of the law and places his or her life at serious and constant risk, for which the State is accountable. In the case at hand, the Committee notes that the State party has produced no evidence to indicate that it has fulfilled its obligation to protect Benattia Zerrougui's life. Therefore the Committee concludes that the State party has failed in its duty to protect Benattia Zerrougui's life, in violation of article 6, paragraph 1, of the Covenant.[10]

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[8] See, for example, *Boudjemai v. Algeria*, para. 8.2.

[9] See, for example, *Boudjemai v. Algeria*, para. 8.3.

[10] See, for example, *Boudjemai v. Algeria*, para. 8.4.

8.5 The Committee recognizes the degree of suffering involved in being held indefinitely without contact with the outside world. It recalls its general comment No. 20 (1992) on the prohibition of torture, or other cruel, inhuman or degrading treatment or punishment,[11] which recommends that States parties should make provision to ban incommunicado detention. It notes in the case at hand that Benattia Zerrougui was arrested by the police on 1 June 1995 and that his fate remains unknown to this day. In the absence of satisfactory explanations from the State party, the Committee considers that this disappearance constitutes a violation of article 7 of the Covenant with regard to Benattia Zerrougui.[12]

8.6 The Committee also takes note of the anguish and distress caused to the author by Benattia Zerrougui's disappearance. It considers that the facts before it reveal a violation of article 7 of the Covenant with regard to him.[13]

8.7 Regarding the complaint of a violation of article 9, the Committee takes note of the author's allegations that Benattia Zerrougui was arrested on 1 June 1995 by police officers wearing the uniform of the *wilaya* security services without a warrant and without being informed of the reasons for his arrest; that he was not informed of the criminal charges against him and was not brought before a judge or other judicial authority so that he could challenge the legality of his detention; and that no official information was given to the author or his family regarding Benattia Zerrougui's fate. In the absence of satisfactory explanations from the State party, the Committee finds a violation of article 9 with respect to Benattia Zerrougui.[14]

8.8 Regarding the complaint under article 10, paragraph 1, the Committee reiterates that persons deprived of their liberty may not be subjected to any hardship or constraint other than that resulting from the deprivation of liberty and that they must be treated with humanity and respect for their dignity. In view of Benattia Zerrougui's incommunicado detention and in the absence of information from the State party in that regard, the Committee finds a violation of article 10, paragraph 1, of the Covenant.[15]

8.9 With regard to the alleged violation of article 16, the Committee reiterates its established jurisprudence, according to which the intentional removal of a person from the protection of the law for a prolonged period of time may constitute a refusal to recognize that person as a person before the law if the victim was in the hands of the State authorities when last seen and if the efforts of his or her relatives to obtain access to potentially effective remedies, including judicial remedies (article 2, paragraph 3, of the Covenant), have been systematically impeded.[16] In the present case, the Committee notes that the State party has not provided information about the fate or whereabouts of the disappeared person despite the author's multiple requests to the State party. The Committee concludes that Benattia Zerrougui's enforced disappearance since 1 June 1995 denied him the protection of the law and deprived him of his right to recognition as a person before the law, in violation of article 16 of the Covenant.

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[11] *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40* (A/47/40), annex VI, sect. A.

[12] See, for example, *Boudjemai v. Algeria*, para. 8.5.

[13] See, for example, *Boudjemai v. Algeria*, para. 8.6.

[14] See, for example, *Boudjemai v. Algeria*, para. 8.7.

[15] See general comment No. 21 (1992) on the humane treatment of persons deprived of their liberty, para. 3 (*Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40* (A/47/40), annex VI, sect. B), and, for example, *Boudjemai v. Algeria*, para. 8.8.

[16] See, for example, *Boudjemai v. Algeria*, para. 8.9.

8.10 The author invokes article 2, paragraph 3, of the Covenant, which imposes on States parties the obligation to ensure an effective remedy for all persons whose Covenant rights have been allegedly violated. The Committee attaches importance to the establishment by States parties of appropriate judicial and administrative mechanisms for addressing claims of rights violations. It refers to its general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant,[17] which provides, inter alia, that a failure by a State party to investigate allegations of violations could, in and of itself, give rise to a separate breach of the Covenant. In the present case, the victim's family contacted the competent authorities, including the public prosecutor at the tribunal of Tiaret and the chief prosecutor at the court of Tiaret, regarding Benattia Zerrougui's disappearance, but all the steps taken have proved futile, and the State party has failed to conduct a thorough and effective investigation into the disappearance of the author's brother. Furthermore, the absence of the legal right to take judicial proceedings since the promulgation of Ordinance No. 06-01 on the implementation of the Charter for Peace and National Reconciliation continues to deprive Benattia Zerrougui, the author and his family of any access to an effective remedy, since the Ordinance prohibits, on pain of imprisonment, the pursuit of legal remedies to shed light on the most serious crimes, such as enforced disappearances (CCPR/C/DZA/CO/3, para. 7). The Committee concludes that the facts before it reveal a violation of article 2 (para. 3) read in conjunction with article 6 (para. 1), article 7, article 9, article 10 and article 16 of the Covenant, with regard to Benattia Zerrougui and of article 2 (para. 3) read in conjunction with article 7 of the Covenant, with regard to the author.

9. The Human Rights Committee, acting under article 5 (para. 4), of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the information before it discloses violations by the State party of article 6 (para. 1), article 7, article 9, article 10 (para. 1), article 16 and article 2 (para. 3), read in conjunction with article 6 (para. 1), article 7, article 9, article 10 (para. 1) and article 16 of the Covenant with regard to Benattia Zerrougui. It also finds a violation of article 7 and of article 2 (para. 3) read in conjunction with article 7, with regard to the author.

10. In accordance with article 2, paragraph 3, of the Covenant, the State party is under an obligation to provide the author and his family with an effective remedy, including by: (a) conducting a thorough and effective investigation into the disappearance of Benattia Zerrougui; (b) providing the author and his family with detailed information about the results of its investigation; (c) releasing Benattia Zerrougui immediately if he is still being detained incommunicado; (d) in the event that Benattia Zerrougui is deceased, handing over his remains to his family; (e) prosecuting, trying and punishing those responsible for the violations committed; and (f) providing adequate compensation to the author for the violations suffered and to Benattia Zerrougui if he is still alive. Notwithstanding the terms of Ordinance No. 06-01, the State party should ensure that it does not impede enjoyment of the right to an effective remedy by victims of crimes such as torture, extrajudicial killings and enforced disappearances. The State party is also under an obligation to take steps to prevent similar violations in the future.

11. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether or not there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when a violation has been established, the Committee wishes to receive

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[17] *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 40*, Vol. I (A/59/40 (Vol. I)), annex III.

from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views and to have them widely disseminated in the official languages of the State party.

[Adopted in English, French and Spanish, the French text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Appendix

Individual opinion of Mr. Fabián Omar Salvioli and Mr. Victor Manuel Rodríguez-Rescia

1. We concur with the decision in communication No. 1796/2008, in which the Human Rights Committee found a violation of the human rights established in article 6 (para. 1), article 7, article 9, article 10 (para. 1), article 16 and article 2 (para. 3), read in conjunction with article 6 (para. 1), article 7, article 9, article 10 (para. 1) and article 16 of the Covenant with respect to Benattia Zerrougui, and a violation of article 7 and of article 2 (para. 3), read in conjunction with article 7, with respect to the author.

2. However, we are concerned that the Committee's Views on the communication concerned do not recognize as an additional violation of the Covenant the existence of national legal provisions that are inherently inconsistent with the Covenant, namely, articles 45 and 46 of Ordinance No. 06-01.

3. We regret having to insist on a legal assessment that differs from that of the majority of the Committee with regard to the effects of the existence and application of articles 45 and 46 of Ordinance No. 06-01 of 27 February 2006 implementing the Charter for Peace and National Reconciliation, adopted by referendum on 29 September 2005, which prohibit any legal action before the courts against members of the Algerian defence and security services for the offences of torture, extrajudicial execution and enforced disappearance. Under the ordinance, anyone submitting such an allegation or complaint is liable to a penalty of 3 to 5 years' imprisonment and a fine of between 250,000 and 500,000 Algerian dinars.

4. The Committee did not expressly state, as we would have wished, that the content of article 45 of the ordinance is inconsistent with the relevant part of article 14 of the Covenant that relates to the right of access to justice enabling persons to assert their rights before the courts. The Committee should also have found a violation of article 2, paragraph 2, which lays down the obligation for States parties to adapt their national legislation to the standards set by the Covenant.

5. The majority of the Committee maintains the practice of not finding violations of rights that are not invoked by the authors of a communication, thereby failing to apply the legal principle of *iura novit curia*. In so doing, the Committee unjustifiably restricts its own competence in a way that is inappropriate for an international body that protects human rights.

6. It should be noted that this alleged practice is not only based on a misconception but is also applied inconsistently: the Human Rights Committee has itself on occasion applied the principle of *iura novit curia*, although it has not mentioned it explicitly in its Views. In recent years, there have been various examples of the Committee's correct application of the provisions of the Covenant on the basis of evidence, but departing from the legal arguments or the specific articles cited by the parties.[a]

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[a] Human Rights Committee, communication No. 1390/2005, *Koreba v. Belarus*, Views adopted on 25 October 2010; Human Rights Committee, communication No. 1225/2003, *Eshonov v. Uzbekistan*, Views adopted on 22 July 2010, para. 8.3; Human Rights Committee, communication No. 1206/2003, *R.M. and S.I. v. Uzbekistan*, Views adopted on 10 March 2010, paras. 6.3, 9.2, with a finding of no violation; Human Rights Committee, communication No. 1520/2006, *Mwamba v. Zambia*, Views adopted on 10 March 2010; Human Rights Committee, communication No. 1320/2004, *Pimentel et*

7. The very existence of articles 45 and 46 of Ordinance No. 06-01, which make complainants of such offences liable to imprisonment and fines, is inconsistent with the International Covenant on Civil and Political Rights, because it establishes a framework of impunity that prevents the investigation, conviction and redress of cases of serious human rights violations, such as the enforced disappearance of Benattia Zerrougui (the author's brother), whose whereabouts are unknown to this day. The legal prohibition on filing a complaint and, therefore, investigating the facts of this case or other similar cases fosters impunity by infringing the right of access to justice, given that the ordinance criminalizes the exercise of the right of petition when a complaint is filed against facts such as those that gave rise to this case, involving an enforced disappearance.

8. The redress measures recommended by the Committee to prevent the recurrence of such acts in other similar cases are insufficient. In its Views, the Committee notes that "the State party should ensure that it does not impede enjoyment of the right to an effective remedy by victims of crimes such as torture, extrajudicial killings and enforced disappearances" (para. 10). We consider in fact that the Committee should have stated clearly and directly that the explicit prohibition under Ordinance No. 06-01 of legal action to initiate investigations of cases of torture, extrajudicial killings and enforced disappearances of persons constitutes a violation of the general obligation under article 2, paragraph 2, of the Covenant, according to which the State of Algeria must "take the necessary steps, in accordance with its constitutional processes and with the provisions of the [...] Covenant, *to adopt such laws* or other measures as may be necessary *to give effect to the rights recognized in the present Covenant*" (emphasis added).

9. The provisions of articles 45 and 46 of Ordinance No. 06-01 foster impunity and prevent the victims of this type of serious offence, and their families, from exercising their right to an effective legal remedy, to know the truth, to assert their human right to justice and to petition and obtain full reparation. Even acknowledging the positive contribution of the remaining provisions of Ordinance No. 06-01 to achieving peace and national reconciliation in Algeria, this should not be at the expense of the fundamental human rights of the victims and their families who have suffered the consequences of serious offences, particularly when those families may be liable to penalties and sanctions that victimize them again for exercising their right to invoke a legal remedy, which is, moreover, one of the tools used to protect and guarantee human rights (such as the right to life or the prohibition of torture) that may not be suspended even in a state of emergency (Covenant, art. 4, para. 2).

10. The legal impossibility of initiating judicial proceedings since the promulgation of Ordinance No. 06-01 on the implementation of the Charter for Peace and National Reconciliation has deprived and continues to deprive Benattia Zerrougui, the author and his family, of any access to an effective remedy, since the ordinance prohibits, on pain of imprisonment, the pursuit of legal remedies to shed light on the most serious crimes, such as enforced disappearances.

11. The Committee should have stated explicitly that the State of Algeria, as a reparation measure aimed at ensuring that such acts do not recur, should comply with the provisions of article 2, paragraph 2, and, accordingly, adopt legislative or other measures to repeal articles 45 and 46 of Ordinance No. 06-01 that establish impediments, penalties,

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al. v. the Philippines, Views adopted on 19 March 2007, paras. 3, 8.3; Human Rights Committee, communication No. 1177/2003, *Ilombe and Shandwe v. Democratic Republic of the Congo*, Views adopted on 17 March 2006, paras. 5.5, 6.5, 9; Human Rights Committee, communication No. 973/2001, *Khalilova v. Tajikistan*, Views adopted on 30 March 2005, para. 3.7; and Human Rights Committee, communication No. 1044/2002, *Shukurova v. Tajikistan*, Views adopted on 17 March 2006, para. 3.

sanctions and any other obstacle fostering impunity for serious offences such as enforced disappearance of persons, torture and extrajudicial killings, not only for the victims referred to in this communication but also for the victims and families in similar cases.

12. In that way, the Committee would also be acting consistently with the concluding observations it adopted on Algeria in 2007 (CCPR/C/DZA/CO/3, paras. 7, 8 and 13), in which it stated unequivocally that Algeria should bring Ordinance No. 06-01 into line with the Covenant. Otherwise, the Committee is going to keep receiving similar individual communications, since the root cause of the failure to investigate and pass sentence on serious violations of this kind will not have been removed.

[Done in English, French and Spanish, the Spanish text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

F. Communication No. 1798/2008, *Azouz v. Algeria* (Views adopted on 25 July 2013, 108th session)*

Submitted by:	Taous Azouz (represented by Track Impunity Always (TRIAL))
Alleged victims:	Mohammed Lemmiz (the author's son) and the author
State party:	Algeria
Date of communication:	7 July 2008 (initial submission)
Subject matter:	Enforced disappearance
Procedural issue:	Legal capacity, exhaustion of domestic remedies
Substantive issues:	Right to life, prohibition of torture and cruel or inhuman treatment, right to liberty and security of person, respect for the inherent dignity of the human person, recognition as a person before the law and right to an effective remedy
Articles of the Covenant:	Articles 2 (para. 3), 6 (para. 1), 7, 9 (paras. 1–4), 10 (para. 1) and 16
Article of the Optional Protocol:	Articles 1 and 5 (para. 2 (b))

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 25 July 2013,

Having concluded its consideration of communication No. 1798/2008, submitted to the Human Rights Committee by Ms. Taous Azouz under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

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* The following members of the Committee participated in the consideration of the communication: Mr. Yadh Ben Achour, Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Walter Kälin, Ms. Zonke Zanele Majodina, Mr. Kheshoe Parsad Matadeen, Mr. Gerald L. Neuman, Sir Nigel Rodley, Mr. Victor Manuel Rodríguez-Rescia, Mr. Fabián Omar Salvioli, Ms. Anja Seibert-Fohr, Mr. Yuval Shany, Mr. Konstantine Vardzelashvili and Ms. Margo Waterval.

Pursuant to rule 90 of the Committee's rules of procedure, Committee member Mr. Lazhari Bouzid did not take part in the examination of this communication.

The text of an individual opinion by Mr. Salvioli and Mr. Rodríguez-Rescia is appended to these Views.

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The author of the communication is Taous Azouz, widow of Mr. Lemmiz, born on 11 February 1950 in Sétif (Algeria). She argues that her son, Mohammed Lemmiz, has been the victim of violations by Algeria of his rights under article 2 (para. 3), article 6 (para. 1), article 7, article 9 (paras. 1 to 4), article 10 (para. 1) and article 16 of the International Covenant on Civil and Political Rights. The author also considers herself to be a victim of violations of article 2 (para. 3) and article 7 of the Covenant. She is represented by counsel.[1]

1.2 On 16 July 2008, in accordance with rule 92 of its rules of procedure, the Committee, acting through the Special Rapporteur on new communications and interim measures, asked the State party not to take any measures likely to impede the author or her family from exercising their right to submit an individual communication to the Committee. The State party was therefore asked not to invoke its national law, notably Ordinance No. 06-01 implementing the Charter for Peace and National Reconciliation, against the author or members of her family.

1.3 On 12 March 2009, the Committee, through the Special Rapporteur on new communications and interim measures, decided not to consider the admissibility and the merits of the communication separately.

The facts as submitted by the author

2.1 Mohammed Lemmiz was arrested at his home by members of the Algerian National People's Army during a military raid carried out under the orders of commander M.B. on 30 April 1996 at 5.30 a.m. The author's son was reportedly taken to the Baraki military barracks. The victim was later said to have been seen at the Beni-Messous barracks. The victim had been arrested previously, along with his brother. They had both subsequently been released by the authorities. His second arrest took place in the presence of his family, including the author, and two neighbours. The family has had no news of the victim since that day.

2.2 The author made several attempts to ascertain her son's fate. Until 1998, out of fear of reprisals and given that the authorities refused to recognize any cases of enforced disappearance, the author took only official measures. She visited police stations, gendarmeries, barracks and the courts in an effort to find out about the circumstances surrounding her son's arrest.

2.3 On 25 July 1999, the author sent a letter to the prosecutor of the Blida military court, since her son had been arrested by members of the Algerian army.[2] She received no reply to that letter. On 28 July 1999, the author sent a letter to the Minister of Justice. After going in person to the National Human Rights Observatory in Algiers, the author sent a letter to the head of that body on 28 July 1999. A second letter was sent to the Observatory on 16 January 2001. The author had also contacted the Ministry of National Defence by means of a letter dated 25 July 1999.

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[1] The Optional Protocol entered into force for the State party on 12 December 1989.

[2] The author had been referred to that court by the civilian courts, which did not consider themselves competent to hear allegations against military personnel regarding acts performed in the course of their duties.

2.4 The author also brought the matter before the ordinary courts, first before the El Harrach court, where the judges merely responded by saying that the victim had probably been kidnapped by criminals, even though accounts from several witnesses contradicted this. A decision that there was no case to answer was issued; the author appealed against this decision to the Algiers Court of Appeal.

2.5 The author argues that it has been impossible for her to have recourse to any judicial remedy before a court of law since the enactment of Ordinance No. 06-01 of 27 February 2006 implementing the Charter for Peace and National Reconciliation, adopted by referendum on 29 September 2005, which bars any judicial action against members of the Algerian defence and security services in respect of events that took place in the country between 1993 and 1998. In addition, the State authorities' silence and their denial of the facts mean that there are no available effective remedies to be pursued before State institutions.

The complaint

3.1 The fact that the author's son was arrested by army personnel in 1996, that he was taken to the Baraki barracks and that he has been missing since then leaves no doubt as to the State authorities' responsibility for his disappearance. Moreover, the threat to his life posed by this disappearance increases over time. If the victim is still in incommunicado detention, this would very clearly pose a grave threat to his right to life, as he would be at the mercy of his jailers and outside the scope of any legal oversight or monitoring mechanisms. Once he was placed in detention, the Algerian authorities should have protected his right to life by, inter alia, ensuring that a record was kept of his arrest, as required under article 52 of the Code of Criminal Procedure. Having failed in its duty to provide such protection, the State party has failed to fulfil its obligation under article 6, paragraph 1, of the Covenant.

3.2 In view of the fact that the authorities have not undertaken any investigation to determine the victim's fate, the State party has violated article 6, paragraph 1, read in conjunction with article 2, paragraph 3, of the Covenant.

3.3 Subjecting the victim to enforced disappearance in and of itself constitutes inhuman or degrading treatment. Moreover, the anguish and suffering caused by indefinite detention without contact with the person's family or the outside world constitute treatment in breach of article 7 of the Covenant. Despite all the family's efforts, the authorities have not conducted any investigations or proceedings, which constitutes a violation of article 7, read in conjunction with article 2, paragraph 3, of the Covenant.

3.4 The anguish and distress caused to the author by the disappearance of her son, combined with the constant uncertainty in which she lives, constitute a violation of article 7 with regard to the author and her family. The authorities' failure to act in this regard constitutes a violation of the author's rights under article 7, read in conjunction with article 2, paragraph 3, of the Covenant.

3.5 The victim was arrested at his home on 30 April 1996 by members of the National People's Army for no apparent reason and without a warrant. He has never been brought before a judicial authority and has not been able to challenge the lawfulness of his detention. The State party has therefore violated the victim's rights under article 9, paragraphs 1 to 4, of the Covenant.

3.6 If it is established that the victim suffered a violation of article 7, then a fortiori he suffered a violation of article 10, paragraph 1, of the Covenant.

3.7 Ever since his arrest, the author's son has been outside the protection of the law and has consequently been deprived of his legal personality. Nor has he had access to a court of law where he could have asserted his rights. The State party has therefore violated article 16 of the Covenant.

3.8 As a victim of enforced disappearance, the author's son has been prevented from exercising his right to a remedy that would allow him to challenge the lawfulness of his detention, in violation of article 2, paragraph 3, of the Covenant. His family has used all legal means to find out about his fate but has received no response.

State party's observations on admissibility

4.1 On 3 March 2009, the State party, in a background memorandum on the inadmissibility of communications submitted to the Human Rights Committee in connection with the implementation of the Charter for Peace and National Reconciliation, contested the admissibility of the communication and of 10 other communications submitted to the Committee. The State party is of the view that communications incriminating public officials, or persons acting on behalf of public authorities, in cases of enforced disappearance during the period in question — from 1993 to 1998 — should be considered within the broader context of the sociopolitical and security conditions that prevailed in the country during a period when the Government was struggling to combat a form of terrorism aimed at bringing about the "collapse of the Republican State". In this context, and in accordance with the Constitution (arts. 87 and 91), protective measures were taken and the Algerian Government notified the United Nations Secretariat that it had declared a state of emergency, in accordance with article 4, paragraph 3, of the Covenant.

4.2 During that period, the Government had to fight against groups that were not formally organized. As a result, there was some confusion in the manner in which a number of operations were carried out among the civilian population, and it was difficult for civilians to distinguish between the actions of terrorist groups and those of the security forces, to whom civilians have often attributed enforced disappearances. Hence, according to the State party, while these enforced disappearances may have had many causes, they cannot be blamed on the Government. According to a variety of independent sources, including the press and human rights organizations, it may be concluded that the disappearances that occurred in Algeria during the period in question are attributable to any one of six possible scenarios, none of which can be ascribed to the State. The first scenario concerns persons who were reported missing by their relatives but who in fact had chosen to go into hiding in order to join an armed group and who instructed their families to report that they had been arrested by the security services as a way of "covering their tracks" and avoiding being "harassed" by the police. The second scenario concerns persons who were reported missing after their arrest by the security services but who took advantage of their subsequent release to go into hiding. The third scenario concerns persons abducted by armed groups which, because they were not identified or because they had stolen uniforms or identification documents from police officers or soldiers, were mistakenly thought to belong to the Armed Forces or security services. The fourth scenario concerns persons reported missing who abandoned their families, and sometimes even left the country, to escape from personal problems or family disputes. The fifth scenario concerns persons who were reported missing by their family but who were in fact wanted terrorists who had been killed and buried in the maquis following factional infighting, doctrinal disputes or arguments over the spoils of war among rival armed groups. The sixth scenario mentioned by the State party concerns persons reported missing who were actually living in Algeria or abroad under a false identity provided by a network of document forgers.

4.3 The State party maintains that it was in view of the diversity and complexity of the situations encompassed by the general notion of disappearance that the Algerian legislature, following the referendum on the Charter for Peace and National Reconciliation, recommended a comprehensive approach to the issue of disappeared persons, whereby all persons who had disappeared in the course of the "national tragedy" would be cared for, all victims would be offered support to overcome their ordeal and all victims of disappearance and their beneficiaries would be entitled to redress. According to statistics from the Ministry of the Interior, 8,023 cases of disappearance have been reported, 6,774 cases have been examined, 5,704 have been approved for compensation and 934 rejected, with 136 still pending. A total of 371,459,390 Algerian dinars has been paid out as compensation to the victims concerned. In addition, a total of 1,320,824,683 dinars has been paid out in monthly pensions.

4.4 The State party further contends that not all domestic remedies have been exhausted. It stresses the importance of distinguishing between simple formalities involving the political or administrative authorities, non-judicial remedies pursued through advisory or mediation bodies, and judicial remedies pursued through the relevant courts of law. The State party observes that, as may be seen from the authors' statements,[3] the complainants have written letters to political and administrative authorities, petitioned advisory or mediation bodies and petitioned representatives of the prosecution service (chief prosecutors and public prosecutors), but have not, strictly speaking, initiated legal action and seen it through to its conclusion by availing themselves of all available remedies of appeal and judicial review. Of all these authorities, only the representatives of the prosecution service are authorized by law to open a preliminary inquiry and refer a case to an investigating judge. In the Algerian legal system, it is the public prosecutor who receives complaints and who institutes criminal proceedings if they are warranted. Nevertheless, in order to protect the rights of victims or their beneficiaries, the Code of Criminal Procedure authorizes the latter to sue for damages by filing a complaint with the investigating judge. In this case, it is the victim, not the prosecutor, who initiates criminal proceedings by bringing the matter before the investigating judge. This remedy, which is provided for in articles 72 and 73 of the Code of Criminal Procedure, has not been utilized, despite the fact that it would enable the victims to institute criminal proceedings and compel the investigating judge to initiate proceedings, even if the prosecution service had decided otherwise.

4.5 The State party also notes the author's contention that the adoption by referendum of the Charter for Peace and National Reconciliation and its implementing legislation — in particular, article 45 of Ordinance No. 06-01 — rules out the possibility that any effective domestic remedies are available in Algeria to the families of victims of disappearances. On this basis, the author believed she did not need to bring the matter before the courts in view of what the author presumed would be the latter's position and findings regarding the application of the ordinance. However, the author cannot invoke this ordinance and its implementing legislation as a pretext for failing to institute the legal proceedings available to her. The State party recalls the Committee's jurisprudence to the effect that a person's subjective belief in, or presumption of, the futility of a remedy does not exempt that person from the requirement that all domestic remedies be exhausted.[4]

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[3] As the State party has provided a common reply to 11 different communications, it refers to the "authors", which include the author of the present communication.

[4] The State party cites, in particular, communications Nos. 210/1986 and 225/1987, *Pratt and Morgan v. Jamaica*, Views adopted on 6 April 1989.

4.6 The State party then turns its attention to the nature, principles and content of the Charter for Peace and National Reconciliation and its implementing legislation. It maintains that, in accordance with the principle of the inalienability of peace, which has become an international right to peace, the Committee should support and consolidate peace and encourage national reconciliation with a view to strengthening States affected by domestic crises. As part of this effort to achieve national reconciliation, the State party adopted the Charter, whose implementing ordinance prescribes legal measures for the discontinuance of criminal proceedings and the commutation or remission of sentences for any person who is found guilty of acts of terrorism or who benefits from the provisions of the legislation on civil dissent, except for persons who have committed or been accomplices in mass killings, rapes or bombings in public places. This ordinance also helps to address the issue of disappearances by introducing a procedure for filing an official finding of presumed death, which entitles beneficiaries to receive compensation as victims of the "national tragedy". Social and economic measures have also been put in place, including the provision of employment placement assistance and compensation for all persons considered to be victims of the "national tragedy". Finally, the ordinance prescribes political measures, such as a provision under which any person who exploited religion in the past in a way that contributed to the "national tragedy" is barred from holding political office, and establishes the inadmissibility of any proceedings brought against individuals or groups belonging to any branch of the country's defence and security forces for actions undertaken to protect persons and property, safeguard the nation and preserve its institutions.

4.7 In addition to the establishment of a fund to compensate all victims of the "national tragedy", the sovereign people of Algeria have, according to the State party, agreed to a process of national reconciliation as the only way to heal the wounds inflicted by that tragedy. The State party insists that the proclamation of the Charter for Peace and National Reconciliation reflects a desire to avoid confrontation in the courts, media outpourings and political score settling. The State party is therefore of the view that the author's allegations are covered by the comprehensive domestic settlement mechanism provided for in the Charter.

4.8 The State party asks the Committee to note how similar the facts and situations described by the author are and to take into account the sociopolitical and security context in which they occurred; to find that the author failed to exhaust all domestic remedies; to recognize that the authorities of the State party have established a comprehensive domestic mechanism for processing and settling the cases referred to in these communications through measures aimed at achieving peace and national reconciliation consistent with the principles of the Charter of the United Nations and subsequent covenants and conventions; to find the communication inadmissible; and to request that the author seek an appropriate remedy.

State party's additional observations on admissibility

5.1 On 9 October 2009, the State party transmitted a further memorandum to the Committee in which it raises the question of whether the submission of a series of individual communications might not actually amount to an abuse of procedure aimed at bringing before the Committee a broad historical issue involving causes and circumstances of which the latter is unaware. The State party observes that these "individual" communications dwell on the general context in which the disappearances occurred and focus solely on the actions of the security forces, never mentioning those of the various armed groups that used criminal techniques of deception to incriminate the Armed Forces.

5.2 The State party insists that it will not address the merits of these communications until the issue of their admissibility has been settled, since all judicial or quasi-judicial bodies have a duty to deal with preliminary questions before considering the merits. According to the State party, the decision to consider the admissibility and the merits of these cases jointly and simultaneously — aside from the fact that it was not arrived at on the basis of consultation — seriously prejudices the proper consideration of the communications in terms of both their general nature and their intrinsic particularities. Referring to the Committee's rules of procedure, the State party notes that the sections relating to the Committee's procedure for determining the admissibility of communications are separate from those relating to the Consideration of the merits of communications and that these questions could therefore be considered separately. Concerning the exhaustion of domestic remedies, the State party stresses that the author did not submit any of her complaints or requests for information through channels that would have enabled the Algerian judicial authorities to examine them.

5.3 Recalling the Committee's jurisprudence regarding the obligation to exhaust domestic remedies, the State party stresses that mere doubts about the prospect of success or concerns about delays do not exempt the author from the obligation to exhaust these remedies. As to the question of whether the promulgation of the Charter for Peace and National Reconciliation has barred the possibility of appeal in this area, the State party replies that the author's failure to submit her allegations to examination has so far prevented the Algerian authorities from taking a position on the scope and limitations of the applicability of the Charter. Moreover, under the ordinance in question, the only proceedings that are inadmissible are those brought against "members of any branch of the defence and security forces of the Republic" for actions consistent with their core duties to the Republic, namely, to protect persons and property, safeguard the nation and preserve its institutions. On the other hand, any allegations concerning actions attributable to the defence or security forces that can be proved to have been taken outside of that framework are subject to consideration by the appropriate courts.

5.4 The State party adds that, pursuant to articles 27 and 28 of Ordinance No. 06-01, the status of victim of the national tragedy is granted by virtue of a declaration of disappearance issued by the criminal investigation service following an unsuccessful search and is subsequently confirmed through a declaration of death issued by the competent court at the beneficiaries' request. The State party notes that the author apparently authorized an international human rights defence organization to submit her communication to the Committee while at the same time acknowledging before the Algerian authorities that she had agreed to take advantage of the settlement procedure afforded by the domestic mechanism provided for in the Charter for Peace and National Reconciliation. The State party also notes that the author has denied before these same authorities that she sought support from TRIAL (the organization acting as counsel for the author) for the submission of her complaint to the Committee, inasmuch as she accepted the domestic settlement procedure provided for in the Charter, as a result of which a declaration of death was issued and an application for compensation was filed.

5.5 In a note verbale of 6 October 2010, the State party reiterates, in extenso, the objections regarding admissibility that it had already submitted on 3 March 2009 and 9 October 2009.

Author's comments on the State party's submission

6.1 On 30 September 2011, the author submitted comments on the State party's observations on admissibility and provided additional arguments on the merits. She points out that the State party has recognized the competence of the Committee to consider individual communications. This competence is of a general nature and its exercise by the

Committee is not subject to the discretion of the State party. In particular, it is not for the State party to determine whether it is appropriate for the Committee to take up a specific case. That is for the Committee to decide when it considers a communication. The author considers that the State party's adoption of domestic legislative and administrative measures to support the victims of the "national tragedy" cannot be invoked at the admissibility stage to prevent individuals subject to its jurisdiction from using the procedure provided for under the Optional Protocol. Even if such measures could have an impact on the settlement of a dispute, they must be studied with regard to the merits of the communication rather than at the admissibility stage. In the present case, the legislative measures themselves amount to a violation of the rights enshrined in the Covenant, as the Committee has previously observed.[5]

6.2 The author recalls that the declaration by Algeria of a state of emergency on 9 February 1992 does not affect a person's right to submit an individual communication to the Committee. Article 4 of the Covenant allows for derogations only from certain provisions of the Covenant during states of emergency, but the exercise of rights under the Optional Protocol is not affected. According to the author, the State party's observations on the appropriateness of the communication do not constitute a valid ground for a finding of inadmissibility.

6.3 The author also refers to the State party's argument that the requirement to exhaust domestic remedies means that the author must institute criminal proceedings by filing a complaint with the investigating judge, in accordance with articles 72 et seq. of the Code of Criminal Procedure. She refers to an individual communication concerning the State party, in which the Committee stated that "the State party has a duty not only to carry out thorough investigations of alleged violations of human rights, particularly enforced disappearances or violations of the right to life, but also to prosecute, try and punish anyone held to be responsible for such violations. To sue for damages for offences as serious as those alleged in the present case cannot be considered a substitute for the charges that should be brought by the public prosecutor".[6] The author therefore considers that, given the serious nature of the alleged offences, it was the responsibility of the competent authorities to take up the case. However, no action has been taken, even though members of Mohammed Lemmiz's family have been trying to make enquiries concerning his whereabouts ever since his arrest, but to no avail.

6.4 The author made use of several informal procedures. She visited police stations, gendarmeries and barracks to find out about the circumstances surrounding her son's arrest. She subsequently appealed to the judicial authorities as well as to the Ombudsman of the Republic, the National Human Rights Observatory and the Minister of Justice, without success. She therefore cannot be accused of failing to exhaust all remedies on the ground that she did not sue for damages by filing a complaint with the investigating judge concerning a human rights violation of such seriousness that the State party could not have been unaware of it.

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[5] The author refers to paras. 7, 8 and 13 of the concluding observations of the Human Rights Committee on the third periodic report of Algeria, adopted on 1 November 2007 (CCPR/C/DZA/CO/3). She also refers to para. 9.2 of communication No. 1588/2007, *Benaziza v. Algeria*, Views adopted on 26 July 2010, and para. 11 of communication No. 1196/2003, *Boucherf v. Algeria*, Views adopted on 30 March 2006. The author also refers to paras. 11, 13 and 17 of the concluding observations of the Committee against Torture on the third periodic report of Algeria, adopted on 13 May 2008 (CAT/C/DZA/CO/3). Lastly, she cites para. 1 of general comment No. 29 (2001) on derogations from the Covenant during states of emergency (*Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 40*, vol. I (A/56/40 (vol. I)), annex VI).

[6] *Benaziza v. Algeria*, para. 8.3.

6.5 As to the State party's argument that mere "subjective belief or presumption" does not exempt the author of a communication from the requirement to exhaust all domestic remedies, the author cites article 45 of Ordinance No. 06-01, whereby legal proceedings may not be brought against individuals or groups who are members of any branch of the defence or security forces. Any person making such a complaint or allegation is liable to a term of imprisonment of from 3 to 5 years and a fine of between 250,000 and 500,000 dinars. The State party has therefore not convincingly demonstrated how suing for damages would enable a court to receive and investigate a complaint, since in doing so it would be in violation of article 45 of the ordinance, or how the author of a complaint could be guaranteed immunity from prosecution under article 46 of the ordinance. As treaty body jurisprudence confirms, a reading of these provisions leads to the conclusion that any complaint regarding the violations suffered by the author and her son would not only be declared inadmissible, but would also be treated as a criminal offence. The State party fails to provide any example of an instance in which, despite the existence of the above-mentioned ordinance, the perpetrators of human rights violations similar to those involved in the present case have actually been prosecuted.

6.6 The author notes the State party's argument in its additional observations on admissibility that the author, acting on her own behalf and that of her son, denies that she sought the support of her counsel, TRIAL, which is representing her in the case before the Committee. The State party bases this assertion on the fact that the author accepted the domestic settlement procedure under the Charter for Peace and National Reconciliation, as a result of which a declaration of death was issued and an application for compensation was filed. The author notes that the State party does not provide any evidence to prove this assertion. It does not produce any written statement by the author denying that she requested her counsel's services. Her counsel, on the other hand, has produced a written power of attorney dated 13 January 2006 authorizing it to act before the Committee on the author's behalf. This power of attorney remains valid.

6.7 The author points out that the Committee against Torture, in its concluding observations of 13 May 2008 concerning Algeria, expressed concern about Ordinance No. 06-01, as it obliges families of missing persons to certify the death of their family member in order to receive compensation, which could constitute a form of inhuman and degrading treatment (CAT/C/DZA/CO/3, para. 13). In the light of this position, acceptance of the domestic settlement procedure can hardly be interpreted as an expression of the author's desire to discontinue the procedure initiated before the Committee. In addition, waivers of prosecution do not apply under any circumstances to crimes such as torture, including rape, and enforced disappearance, which are crimes to which the statute of limitations does not apply (CAT/C/DZA/CO/3, para. 11). The State party therefore remains under an obligation to conduct an independent and impartial investigation into any allegation of international crimes with the aim of prosecuting and punishing the persons responsible, irrespective of any measures taken with a view to national reconciliation. Thus, the fact that the author accepted the domestic settlement procedure provided for in the Charter for Peace and National Reconciliation does not release the State party from its obligation to investigate and prosecute the perpetrators of her son's enforced disappearance.

6.8 With respect to the merits of the communication, the author notes that the State party has simply listed a number of scenarios according to which victims, in general, of the "national tragedy" might have disappeared. Such general comments do not refute the allegations made in the present communication. In fact, the same comments have been put forward in a series of other cases, which demonstrates the State party's continuing unwillingness to consider such cases individually.

6.9 With regard to the State party's argument that it is entitled to request that the admissibility of the communication be considered separately from the merits, the author refers to rule 97, paragraph 2, of the rules of procedure of the Human Rights Committee, which states that the working group or special rapporteur may, because of the exceptional nature of a case, request a written reply that relates only to the question of admissibility. Consequently, it is not for the author of the communication or the State party to take such decisions, which are the sole prerogative of the working group or special rapporteur. The author considers that the present case is no different from other cases of enforced disappearance and that admissibility should not be considered separately from the merits.

6.10 The author points out that the State party is required to submit "explanations or statements that shall relate both to the communication's admissibility and its merits". She also refers to the jurisprudence of the treaty bodies, which consider that, in the absence of statements from the State party on the merits, the Committee may reach a decision on the basis of the information in the case file. Numerous reports on the actions of the security forces during the period in question and the many steps taken by the victim's family members corroborate the allegations made by the author in her communication. In view of the State party's involvement in the disappearance of her son, the author is unable to provide additional information in support of her communication, as that information is entirely in the hands of the State party. The author also asserts that the State party's failure to make any observations regarding the merits of the case is tantamount to an acknowledgement on its part that violations were committed.

Issues and proceedings before the Committee

Consideration of admissibility

7.1 First of all, the Committee wishes to point out that the decision by the Special Rapporteur to examine the admissibility and the merits jointly (see para. 1.3 above) does not preclude their being considered separately by the Committee. The joint consideration of the admissibility and the merits does not mean they must be examined simultaneously. Consequently, before considering any claim contained in a communication, the Committee must decide, in accordance with rule 93 of its rules of procedure, whether the communication is admissible under the Optional Protocol.

7.2 The State party argues that the author, acting on her own behalf and that of her son, denies that she sought the support of TRIAL to represent her in the case before the Committee based on the fact that she accepted the domestic settlement procedure provided for in the Charter for Peace and National Reconciliation, as a result of which a declaration of death was issued and an application for compensation was filed. The Committee notes the argument put forward by the author's counsel, according to which the State party has not provided any evidence to prove its assertions. The Committee notes that the present communication was registered in accordance with its rules of procedure, and more specifically rule 96, under which a communication must be submitted by the individual personally or by his or her representative. In the present case, counsel has produced a power of attorney signed by the author on 13 January 2006 authorizing it to act before the Committee. The author has never challenged the authenticity of this power of attorney before the Committee.

7.3 The Committee also takes note of the State party's statement that the author acknowledged to the Algerian authorities that she had agreed to benefit from the settlement procedure established by the domestic mechanism provided for in the Charter for Peace and National Reconciliation. The Committee is of the view, however, that acceptance of the domestic settlement procedure cannot be interpreted as an expression of the author's desire to discontinue the procedure initiated before the Committee. The Committee therefore considers the communication to be admissible under article 1 of the Optional Protocol.

7.4 As required under article 5, paragraph 2 (a), of the Optional Protocol, the Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement.

7.5 The Committee notes that, in the State party's view, the author and her family have not exhausted domestic remedies, since they did not consider bringing up the matter with the investigating judge and suing for damages in criminal proceedings under articles 72 and 73 of the Code of Criminal Procedure. The Committee also notes that, according to the State party, the author wrote letters to political and administrative authorities and petitioned representatives of the prosecution service (chief prosecutors or public prosecutors) but has not, strictly speaking, initiated legal action and seen it through to its conclusion by availing herself of all available remedies of appeal and judicial review. The Committee notes the author's argument that, after contacting police stations and gendarmeries on an unofficial basis, she approached the judicial authorities, namely the El Harrach court and the Algiers court, and then the Blida military court, which the other two courts had indicated was the one that was competent to hear the case. The Committee also notes that no proceedings or investigations were initiated as a result of all these efforts and that the author, despite the administrative and judicial actions undertaken, has not been able to obtain any official information about the fate of her son. Lastly, the Committee notes that, according to the author, article 46 of Ordinance No. 06-01 provides for the penalization of any person who files a complaint pertaining to actions covered by article 45 thereof.

7.6 The Committee recalls that the State party has a duty not only to carry out thorough investigations of alleged human rights violations brought to the attention of its authorities, particularly enforced disappearances or violations of the right to life, but also to prosecute, try and punish anyone held to be responsible for such violations.[7] The family of Mohammed Lemmiz has repeatedly contacted the competent authorities concerning his disappearance, but the State party has failed to conduct a thorough and effective investigation. The State party has also failed to provide sufficient evidence that an effective remedy is available, since Ordinance No. 06-01 of 27 February 2006 continues to be applicable despite the Committee's recommendations that it should be brought into line with the Covenant (CCPR/C/DZA/CO/3, paras. 7, 8 and 13). The Committee is of the view that suing for damages for offences as serious as those alleged in the present case cannot be considered a substitute for the charges that should be brought by the public prosecutor.[8] Moreover, given the vague wording of articles 45 and 46 of the ordinance, and in the absence of convincing information from the State party about their interpretation and actual enforcement, the author's fears regarding the effectiveness of filing a complaint are reasonable.

7.7 The Committee considers that, in order for a communication to be admissible, the only remedies which the author must have exhausted are the effective remedies for the alleged violation, which in this case is an enforced disappearance. In the light of all these considerations, the Committee concludes that article 5, paragraph 2 (b), of the Optional Protocol is not an obstacle to the admissibility of the present communication.

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[7] See, for example, communication No. 1791/2008, *Boudjemai v. Algeria*, Views adopted on 22 March 2013, para. 7.4.

[8] See, for example, *Boudjemai v. Algeria*, para. 7.4.

7.8 The Committee finds that the author has provided sufficient substantiation for her allegations insofar as they raise issues under article 6 (para. 1), article 7, article 9, article 10, article 16 and article 2 (para. 3) of the Covenant and therefore proceeds to consider the communication on the merits.

Consideration of the merits

8.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as required under article 5, paragraph 1, of the Optional Protocol.

8.2 The State party has provided general, collective comments on the complaints submitted by the authors of several communications, including the author of the present communication. The State party has contented itself with arguing that communications incriminating public officials or persons acting on behalf of public authorities in cases of enforced disappearances occurring between 1993 and 1998 should be considered within the broader context of the sociopolitical and security conditions that prevailed in the country during a period when the Government was struggling to combat terrorism. The Committee refers to its jurisprudence[9] and recalls that the State party may not invoke the provisions of the Charter for Peace and National Reconciliation against persons who invoke provisions of the Covenant or who have submitted or may submit communications to the Committee. The Covenant requires the State party to show concern for the fate of each individual and to treat each person with respect for the inherent dignity of the human person. Ordinance No. 06-01, without the amendments recommended by the Committee, appears to promote impunity and therefore cannot, as it currently stands, be considered compatible with the provisions of the Covenant.

8.3 The Committee notes that the State party has not replied to the author's allegations concerning the merits of the case and recalls that, as is established in its jurisprudence,[10] the burden of proof should not rest solely on the author of a communication, especially since the author and the State party do not always have the same degree of access to evidence and since often only the State party is in possession of the necessary information. It follows from article 4, paragraph 2, of the Optional Protocol that the State party has a duty to investigate in good faith all allegations of violations of the Covenant made against it and its representatives and to provide the Committee with the information available to it.[11] In the absence of explanations from the State party in this respect, due weight must be given to the author's allegations, provided they have been sufficiently substantiated.

8.4 The Committee notes that, according to the author, her son was arrested at his home by members of the Algerian National People's Army during a military raid carried out under the orders of commander M. B. on 30 April 1996 at 5.30 a.m.; that he was reportedly taken to the Baraki military barracks; that he was later said to have been seen at the Beni-Messous barracks; and that the family has had no news of him since his arrest. The Committee recalls that, in cases of enforced disappearance, the deprivation of liberty, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate of the disappeared person, removes the person from the protection of the law and places his or her life at serious and constant risk, for which the State is accountable. In the case at hand, the Committee notes that the State party has produced no evidence to indicate that it has fulfilled its obligation to protect Mohammed Lemmiz's life. Therefore the

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[9] *Boudjemai v. Algeria*, para. 8.2.

[10] See, for example, *Boudjemai v. Algeria*, para. 8.3.

[11] See, for example, *Boudjemai v. Algeria*, para. 8.3.

Committee concludes that the State party has failed in its duty to protect the victim's life, in violation of article 6, paragraph 1, of the Covenant.[12]

8.5 The Committee recognizes the degree of suffering involved in being held indefinitely without contact with the outside world. It recalls its general comment No. 20 (1992) on the prohibition of torture, or other cruel, inhuman or degrading treatment or punishment,[13] in which the Committee recommends that States parties should make provision against incommunicado detention. It notes in the case at hand that Mohammed Lemmiz was arrested by members of the Algerian National People's Army on 30 April 1996 and that his fate remains unknown to this day. In the absence of satisfactory explanations from the State party, the Committee considers that this disappearance constitutes a violation of article 7 of the Covenant with regard to Mohammed Lemmiz.[14]

8.6 The Committee also takes note of the anguish and distress suffered by Mohammed Lemmiz's mother because of his disappearance. It considers that the facts before it reveal a violation of article 7 of the Covenant with regard to the author.[15]

8.7 Regarding the question of a violation of article 9, the Committee takes note of the author's allegations that Mohammed Lemmiz was never brought before an investigating judge so that he could challenge the legality of his detention and that no official information was given to the author or her family regarding the victim's fate. In the absence of satisfactory explanations from the State party, the Committee finds a violation of article 9 with respect to Mohammed Lemmiz.[16]

8.8 Regarding the complaint lodged under article 10, paragraph 1, the Committee reiterates that persons deprived of their liberty may not be subjected to any hardship or constraint other than that resulting from the deprivation of liberty and that they must be treated with humanity and respect for their dignity. In view of Mohammed Lemmiz's incommunicado detention and in the absence of information from the State party in that regard, the Committee finds a violation of article 10, paragraph 1, of the Covenant.[17]

8.9 With regard to the question of a violation of article 16, the Committee reiterates its established jurisprudence, according to which the intentional removal of a person from the protection of the law for a prolonged period of time may constitute a refusal to recognize that person as a person before the law if the victim was in the hands of the State authorities when last seen and if the efforts of his or her relatives to obtain access to potentially effective remedies, including judicial remedies (article 2, paragraph 3, of the Covenant), have been systematically impeded.[18] In the present case, the Committee notes that the State party has not provided information about the fate or whereabouts of the disappeared person despite the author's multiple requests for information from the State party. The Committee finds that Mohammed Lemmiz's enforced disappearance since 30 April 1996 has denied him the protection of the law and has deprived him of his right to recognition as a person before the law, in violation of article 16 of the Covenant.

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[12] See, for example, *Boudjemai v. Algeria*, para. 8.4.

[13] *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40*, (A/47/40), annex VI, sect. A.

[14] See, for example, *Boudjemai v. Algeria*, para. 8.5.

[15] See, for example, *Boudjemai v. Algeria*, para. 8.6.

[16] See, for example, *Boudjemai v. Algeria*, para. 8.7.

[17] See general comment No. 21 (1992) on the humane treatment of persons deprived of their liberty, para. 3 (*Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40*, (A/47/40), annex VI, sect. B), and, for example, *Boudjemai v. Algeria*, para. 8.8.

[18] See, for example, *Boudjemai v. Algeria*, para. 8.9.

8.10 The author invokes article 2, paragraph 3, of the Covenant, which imposes on States parties the obligation to ensure that any person whose Covenant rights have been violated has an effective remedy. The Committee attaches importance to the establishment by States parties of appropriate judicial and administrative mechanisms for addressing claims of rights violations. It refers to its general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant,[19] which provides, inter alia, that a failure by a State party to investigate allegations of violations could, in and of itself, give rise to a separate breach of the Covenant. In the present case, the author contacted the competent authorities concerning the disappearance of Mohammed Lemmiz as soon as he was arrested. All the steps taken have proved futile, and the State party has failed to conduct a thorough and effective investigation into the disappearance. Meanwhile, the absence of the legal right to undertake judicial proceedings which has existed since the promulgation of Ordinance No. 06-01 on the implementation of the Charter for Peace and National Reconciliation continues to deprive Mohammed Lemmiz and the author of any access to an effective remedy, inasmuch as the Ordinance prohibits, on pain of imprisonment, the pursuit of legal remedies with a view to shedding light on the most serious crimes, such as enforced disappearances. (CCPR/C/DZA/CO/3, para. 7).

8.11 The Committee also notes that, according to the State party, the domestic settlement procedure accepted by the author, as a result of which a declaration of death was issued and an application for compensation was filed, is exclusive and therefore incompatible with the submission of a communication to the Committee concerning violations of the Covenant. In this regard, the Committee recalls what it has stated in paragraph 7.3 and stresses that States have an obligation to conduct thorough and effective investigations into serious human rights violations, including enforced disappearances, irrespective of any measures taken with a view to national reconciliation. The Committee considers, in particular, that the provision of compensation must not be made contingent upon the issuance of a declaration of death in respect of a disappeared person.[20]

8.12 In the light of the foregoing, the Committee finds that the facts before it reveal a violation of article 2 (para. 3), read in conjunction with article 6 (para. 1), article 7, article 9, article 10 and article 16 of the Covenant, with regard to Mohammed Lemmiz and of article 2 (para. 3), read in conjunction with article 7 of the Covenant, with regard to the author.

9. The Human Rights Committee, acting under article 5 (para. 4), of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the information before it discloses violations by the State party of article 6 (para. 1), article 7, article 9, article 10 (para. 1), article 16 and article 2 (para. 3), read in conjunction with article 6 (para. 1), article 7, article 9, article 10 (para. 1) and article 16 of the Covenant, with regard to Mohammed Lemmiz. It also finds a violation of article 7 and of article 2 (para. 3), read in conjunction with article 7, with regard to the author.

10. In accordance with article 2, paragraph 3, of the Covenant, the State party is under an obligation to provide the author and her family with an effective remedy by, inter alia: (a) conducting a thorough and effective investigation into the disappearance of Mohammed Lemmiz; (b) providing the author with detailed information about the results of its investigation; (c) releasing the victim immediately if he is still being held incommunicado; (d) if Mohammed Lemmiz is deceased, handing over his remains to his family; (e)

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[19] *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 40*, vol. I (A/59/40 (vol. I)), annex III.

[20] Communications Nos. 1917/2009, 1918/2009, 1925/2009 and 1953/2010, *Prutina and others v. Bosnia and Herzegovina*, Views adopted on 28 March 2013, para. 9.6.

prosecuting, trying and punishing those responsible for the violations committed; and (f) providing adequate compensation to the author for the violations suffered — regardless of whether or not she acknowledges her son's death if that is in fact the case — and to Mohammed Lemmiz if he is still alive. Ordinance No. 06-01 notwithstanding, the State party should ensure that it does not impede enjoyment of the right to an effective remedy by victims of crimes such as torture, extrajudicial killings and enforced disappearances. The State party is also under an obligation to take steps to prevent similar violations in the future.

11. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether or not there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when a violation has been established, the Committee wishes to receive information from the State party, within 180 days, about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views and to have them widely disseminated in the official languages of the State party.

[Adopted in English, French and Spanish, the French text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Appendix

Individual opinion of Mr. Fabián Omar Salvioli and Mr. Victor Manuel Rodríguez-Rescia

1. We concur with the decision arrived at by the Human Rights Committee concerning communication No. 1798/2008, in respect of which the Committee found violations of the human rights referred to in article 6 (para. 1), article 7, article 9, article 10 (para. 1) and article 16 and breaches of the obligations set forth in article 2 (para. 3), read in conjunction with article 6 (para. 1), article 7, article 9, article 10 (para. 1) and article 16, of the Covenant with respect to Mohammed Lemmiz, together with a violation of article 7 and of article 2 (para. 3), read in conjunction with article 7, with respect to the author.

2. However, we are concerned that, in its Views on the above-mentioned communication, the Committee did not also characterize the existence of national legal provisions that are inherently inconsistent with the Covenant, namely, articles 45 and 46 of Ordinance No. 06-01, as an additional violation of the Covenant.

3. We regret having to insist on a legal assessment that differs from that of the majority of the Committee with regard to the effects of the existence and application of articles 45 and 46 of Ordinance No. 06-01 of 27 February 2006 implementing the Charter for Peace and National Reconciliation, adopted by referendum on 29 September 2005, which prohibit any legal action before the courts against members of the Algerian defence and security services for the offences of torture, extrajudicial killings and enforced disappearance. Under the ordinance, anyone lodging such a charge or complaint is liable to a penalty of from 3 to 5 years' imprisonment and a fine of between 250,000 and 500,000 Algerian dinars.

4. The Committee did not expressly state, as we would have wished, that the content of article 45 of Ordinance No. 06-01 is inconsistent with the provisions of article 14 of the Covenant concerning the right of all persons to have access to justice so that they may assert their rights. The Committee should also have found a violation of article 2, paragraph 2, which lays down the obligation of States parties to adapt their laws so as to give effect to the provisions set forth in the Covenant.

5. The majority of the Committee maintains the practice of refraining from finding violations of rights that are not invoked by the authors of a communication, thereby failing to apply the legal principle of *iura novit curia*. In so doing, the Committee needlessly restricts its own sphere of competence in a way that is inappropriate for an international body that protects human rights.

6. This practice is not only misguided but is also inconsistent: the Human Rights Committee has itself, on occasion, applied the principle of *iura novit curia* in its Views, although it has not said so explicitly. In recent years, there have been various instances in which the Committee has correctly applied the provisions of the Covenant on the basis of evidence before it that is not covered in the legal arguments or the specific articles cited by the parties.[a]

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[a] Human Rights Committee, communication No. 1390/2005, *Koreba v. Belarus*, Views adopted on 25 October 2010; Human Rights Committee, communication No. 1225/2003, *Eshonov v. Uzbekistan*, Views adopted on 22 July 2010, para. 8.3; Human Rights Committee, communication No. 1206/2003, *R.M. and S.I. v. Uzbekistan*, Views adopted on 10 March 2010, paras. 6.3 and 9.2, with a finding of no violation; Human Rights Committee, communication No. 1520/2006, *Mwamba v. Zambia*, Views adopted on 10 March 2010; Human Rights Committee, communication No. 1320/2004, *Pimentel et*

7. The very existence of articles 45 and 46 of Ordinance No. 06-01, under which persons reporting any of the offences covered by its provisions are liable to imprisonment and fines, is inconsistent with the International Covenant on Civil and Political Rights because these articles establish a framework of impunity that prevents the investigation, conviction and redress of cases of serious human rights violations, such as the enforced disappearance of Mohammed Lemmiz (the author's son), whose whereabouts are unknown to this day. The legal prohibition on filing a complaint regarding the events involved in this case or other similar cases — and, hence, on investigating them — fosters impunity by infringing the right of access to justice, given that the ordinance sets out penalties for the exercise of the right of petition in respect of acts such as those that gave rise to this communication, which deals with an enforced disappearance.

8. The measures of redress recommended by the Committee with a view to preventing the recurrence of such acts in other similar cases are insufficient. In its Views, the Committee says that "the State party should ensure that it does not impede enjoyment of the right to an effective remedy by victims of crimes such as torture, extrajudicial killings and enforced disappearances" (para. 10). We consider in fact that the Committee should have stated, clearly and directly, that the explicit prohibition under Ordinance No. 06-01 of legal action to initiate investigations of cases of torture, extrajudicial killings and enforced disappearances constitutes a violation of the general obligation set out in article 2, paragraph 2, of the Covenant, according to which the State of Algeria must "take the necessary steps, in accordance with its constitutional processes and with the provisions of the […] Covenant, *to adopt such laws* or other measures as may be necessary *to give effect to the rights recognized in the present Covenant*" (emphasis added).

9. Articles 45 and 46 of Ordinance No. 06-01 foster impunity and prevent the victims of this type of serious offence and their families from exercising their right to an effective legal remedy, to know the truth, to assert their fundamental right to justice, to petition and to obtain full reparation. Even if the remaining provisions of Ordinance No. 06-01 do make a contribution to the achievement of peace and national reconciliation in Algeria, this should not be done at the expense of the fundamental human rights of the victims and their families, who have suffered the consequences of such serious offences, and much less by making those families liable to punishments and fines, thereby re-victimizing them if they exercise their right to invoke a legal remedy. That right is, moreover, one of the means used to protect and guarantee other human rights (such as the right to life or the right not to be subjected to torture) that may not be suspended even in a state of emergency (Covenant, art. 4, para. 2).

10. The legal impossibility of initiating judicial proceedings since the promulgation of Ordinance No. 06-01 on the implementation of the Charter for Peace and National Reconciliation has deprived and continues to deprive Mohammed Lemmiz, the author and her family of any access to an effective remedy, since the ordinance prohibits, on pain of imprisonment, the pursuit of legal remedies with a view to shedding light on the most serious crimes, such as enforced disappearances.

11. The Committee should have stated explicitly that, as a reparation measure aimed at ensuring that such acts do not recur, Algeria should comply with the provisions of article 2, paragraph 2, and, accordingly, such laws or other measures as may be necessary to repeal

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al. v. the Philippines, Views adopted on 19 March 2007, paras. 3 and 8.3; Human Rights Committee, communication No. 1177/2003, *Ilombe and Shandwe v. the Democratic Republic of the Congo*, Views adopted on 17 March 2006, paras. 5.5, 6.5 and 9.1; Human Rights Committee, communication No. 973/2001, *Khalilova v. Tajikistan*, Views adopted on 30 March 2005, para. 3.7; and Human Rights Committee, communication No. 1044/2000, *Shukurova v. Tajikistan*, Views adopted on 17 March 2006, para. 3.

articles 45 and 46 of Ordinance No. 06-01 and thereby do away with any prohibitions, penalties, sanctions and any other obstacle that would have the effect of allowing serious offences such as enforced disappearance of persons, torture and extrajudicial killings to go unpunished, not only in respect of the victims referred to in this communication but also in respect of victims and their families in similar cases.

[Done in English, French and Spanish, the French text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

G. Communication No. 1808/2008, *Kovalenko v. Belarus* (Views adopted on 17 July 2013, 108th session)[*]

Submitted by:	Sergey Kovalenko (not represented by counsel)
Alleged victims:	The author
State party:	Belarus
Date of communication:	8 May 2008 (initial submission)
Subject matter:	Breaking up a peaceful assembly aimed at commemorating the victims of the Stalinist repressions in violation of the right to express opinions and the right to hold a peaceful assembly without unreasonable restrictions
Procedural issue:	None
Substantive issues:	Right to freedom of expression; permissible restrictions; right to peaceful assembly
Articles of the Covenant:	19, paragraph 2; 21
Article of the Optional Protocol:	5, paragraph 2 (b)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 17 July 2013,

Having concluded its consideration of communication No. 1808/2008, submitted to the Human Rights Committee by Sergey Kovelenko under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Sergey Kovalenko, a Belarusian national born in 1975, residing in Vitebsk, Belarus. He claims to be a victim of violations by Belarus of his rights under article 19, paragraph 2, and article 21 of the International Covenant on Civil and Political Rights. The Optional Protocol entered into force for the State party on 30 December 1992. The author is not represented.

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[*] The following members of the Committee participated in the examination of the present communication: Mr. Yadh Ben Achour, Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, Mr. Cornelis Flinterman, Ms. Zonke Zanele Majodina, Mr. Kheshoe Parsad Matadeen, Mr. Gerald L. Neuman, Sir Nigel Rodley, Mr. Victor Manuel Rodríguez-Rescia, Mr. Fabián Omar Salvioli, Ms. Anja Seibert-Fohr, Mr. Yuval Shany, Mr. Konstantine Vardzelashvili and Ms. Margo Waterval.

Factual background

2.1 On 30 October 2007, the author, together with about thirty other inhabitants of Vitebsk who all had relatives who had been shot dead in the Stalinist camps or had died from diseases during forced labour in Soviet Russia in the 1930s–1950s, took part in a commemorative service. The author took part in the commemoration as he believed that the communist (Stalinist) regime was repressive and aimed at the suppression of political pluralism in the Soviet society. Thus, by participating in the commemoration, he wished to express, together with other participants, a negative attitude towards the violent suppression of all types of dissent. The commemoration was intended to include a visit to the place near Polyai village where the victims of political repression had been executed and buried, and a visit to two cemeteries close to Voroni and Kopti villages. The participants intended to lay wreaths and flowers and to erect a cross.

2.2 When the participants' bus stopped at the parking lot close to the venue for the commemoration near Polyai village and started taking out wreaths, flowers, the parts of the cross to be assembled, etc., police officers demanded that the commemoration be stopped, as in the opinion of the Deputy Head of the Vitebsk District Department of Internal Affairs, it constituted an unauthorized mass event (a "picket"). The participants refused to stop the commemoration. The author explains that, at that moment, he was carrying a white-red-white flag, which in his view symbolizes the Belarusian State and its independence, and the rejection of the communist past. The police officers asked him to roll it up, which he did, unfurling it again only when the cross was erected in the neighbouring wood, at the place where the victims of political repression had been executed. When the participants boarded the bus to continue to Voroni and Kopti villages, the Deputy Head of the Vitebsk District Department of Internal Affairs entered the bus and announced that he was breaking up the commemoration and that all passengers were being detained as participants in an unauthorized mass event. The participants, including the author, expressed their disagreement with this decision but obeyed the order.

2.3 On the same bus, the author and the other participants were brought to the Vitebsk District Department of Internal Affairs of the Vitebsk Region, where the author was cited for having committed an administrative offence under article 23.34, part 3, of the Code on Administrative Offences (violation of the established procedure for organizing or conducting a mass event or a "picket").

2.4 By ruling of 31 October 2007, the Vitebsk District Court of the Vitebsk Region found the author guilty of having committed an administrative offence under article 23.34, part 3, of the Code on Administrative Offences and fined him 620,000 Belarusian roubles.[1] According to the court ruling, in court the author challenged the definition of his actions as participation in an unauthorized picket, as he simply participated in a commemoration for the victims of repressions, listened to those speaking and carried a white-red-white flag, which for him symbolizes the Belarusian State. The court referred to article 2 of the Law on Mass Events of 30 December 1997, according to which a "picket" is a public expression by a citizen or by a group of citizens of public and political, group or individual and other interests or the protest (without a procession), including by hunger strike, of any issues, with or without the use of posters, banners and other materials. The Vitebsk District Court concluded that, by actively taking part in a mass event in a public place and, in particular, by holding unfurled flags and a cross for a long period of time on the parking lot with the other participants at the mass event, the author publicly expressed his personal and other interests.

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[1] Approximately 200 euros.

2.5 On 8 November 2007, the author filed a cassation appeal with the Vitebsk Regional Court against the Vitebsk District Court's ruling of 31 October 2007. In his appeal, he contested the legal definition by the court of his actions. He admitted having displayed a white-red-white flag, symbolizing the Belarusian State, and pointed out that he had not displayed any posters, banners or other materials and, therefore, had not publicly expressed a group, individual or other interest or protest. The commemoration took place in remote woodland shielded from public view. He also noted that, even if he did take part in an unauthorized mass event ("picket"), article 23.34 of the Code on Administrative Offences proscribes a violation of the established procedure for the organization or holding of a mass event or of a "picket", it does not penalize mere participation in a mass event of this type. Moreover, during the same period, Christians in Belarus were observing the autumn day of the dead: the exercise of religious rites is not governed by Belarus laws. Lastly, he claimed that the commemoration in which he took part was a peaceful citizens' gathering. He participated in the commemoration as he wanted to express his negative view of political repression, and the commemoration did not pose a threat to national security, public safety, public order, the protection of public health, morals or rights and freedoms of others. Furthermore, by arresting him, the authorities prevented the realization of his right to peaceful assembly guaranteed both under the Belarus Constitution and by the international obligations of Belarus.

2.6 On 28 November 2007, the Vitebsk Regional Court rejected the author's appeal. The court concluded that the evidence before it permitted it to establish that the author had participated, together with other individuals, in an unauthorized picket aimed at expressing personal or other interests. The event was of a public nature, as established by witnesses' testimonies and the content of videotapes. The participants remained on the parking lot displaying flags for a long time in the presence of onlookers. Accordingly, the court concluded that the event in which the author had participated was conducted in violation of the requirements of article 2 of the Law on Mass Events, which required participants at the commemoration to seek an authorization from the competent authorities to hold a mass event. The actions of the author were correctly qualified by the district court under article 23.34, part 3, of the Code on Administrative Offences. The fine imposed on the author had been determined within the amounts prescribed under the law.

2.7 On 21 December 2007, the author requested the Supreme Court to examine the rulings of the Vitebsk District Court and the Vitebsk Regional Court under the supervisory review proceedings. In his request, he reiterated his previous arguments presented on appeal. On 4 February 2008, a Deputy Chair of the Supreme Court dismissed the author's appeal. The Supreme Court took into account that the author had previously been subject to an administrative penalty under article 23.34, part 1, of the Code on Administrative Offences as he had already participated in unauthorized pickets. The evidence on file showed that the author had participated in an unsanctioned mass event and a videotape showed him displaying a white-red-white flag with the intention of expressing certain interests. Accordingly, the Deputy Chair of the Supreme Court concluded that the lower courts had correctly defined the author's actions under part 3 of article 23.34 of the Code on Administrative Offences.

The complaint

3.1 The author submits that his detention by the police on 30 October 2007 in the course of the commemoration interfered with his right to freedom of expression, as guaranteed by article 19, paragraph 2, of the Covenant. He also contends that his acts were wrongly defined by the court as participation in a mass event.

3.2 He also submits that the commemoration in question was never intended to constitute a political, social or economic action and, therefore, the participants had not sought prior authorization for its conduct. The commemoration he participated in was a peaceful citizens' gathering, and the participants' actions did not affect the rights and freedoms of others, nor did they damage individual or public property. According to the author, the authorities had not presented any facts disclosing a breach of national security or of public order during the commemoration, and thereby endorsed its peaceful nature. Neither did they provide any documentary evidence of threats to the life and health of individuals, to their morals or of breaches of their rights and freedoms. Therefore, according to the author, the State party has also violated his right to peaceful assembly as protected by article 21 of the Covenant.

The State party's observations on admissibility and merits

4.1 By note verbale of 24 November 2008, the State party submitted its observations on the admissibility and merits of the communication. It contends that the arguments adduced by the author regarding the unlawful engagement of his administrative liability under article 23.34, part 3, of the Code on Administrative Offences are groundless. Under article 35 of the Constitution, freedom of assembly, meetings, street rallies, demonstrations and pickets that do not affect the public order and the rights of other Belarusian citizens are guaranteed by the State; the proceedings regarding the conduct of such events is to be regulated by law. That law is the Law on Mass Events of 20 December 1997, which established the procedure for creating conditions for the realization of constitutional rights and freedoms of citizens, and the protection of public safety and order during the conduct of such events on the streets, on squares and in other public places.

4.2 The State party notes that the author does not contest his participation in a mass event on 30 October 2007, which he qualifies as a peaceful assembly – a commemoration. This event was conducted in a place used as a bus station and, moreover, on the Vitebsk-Liozno road, using white-red-white flags such as the one carried by the author. The State party rejects the author's view that such flags symbolize the State and its independence, and notes that these colours do not constitute a State symbol.

4.3 The State party explains that the court took a well-founded decision when concluding that the author had participated in a picket as defined under article 2 of the Law on Mass Events. This is confirmed by the number of participants in the event, the use of non-State symbols and their intention to place crosses in a location freely chosen by the participants. During the events, the participants also made oral statements. No authorization for the conduct of the event in question was issued, and the participants were duly notified of that fact by the police and invited to stop the event, to no avail. The court therefore properly found that the author had participated in an unauthorized picket. Given that this offence was committed less than a year after he had committed a similar offence, the court correctly concluded the existence in the author's actions of the elements of the offence under article 23.34, part 3, of the Code on Administrative Offences.

4.4 According to the State party, no breach of the norms of international law have been committed in this case, contrary to the author's allegations. The principle of equality before the law is enacted in Belarus, and the State guarantees the protection of its citizens. The wish of a group of citizens to conduct a mass event or to participate in it may not affect the rights and freedoms of others. This is also the aim of the provisions in the Law on Mass Events and article 23.34, part 3, of the Code on Administrative Offences.

4.5 The State party finally explains that the author had the possibility to submit an appeal under the supervisory review proceedings to the Supreme Court and to the Prosecutor's Office. It notes that the author had chosen to appeal only to the Supreme Court, and, therefore, failed to exhaust all domestic remedies.

Author's comments on the State party's observations

5.1 The author provided his comments on the State party's observations on 11 January 2009. He notes that under article 2, paragraph 2, of the Covenant, the State party undertook to create such legal and legislative conditions as to ensure the exercise of the rights of the individuals under its jurisdiction. Article 33 of the Constitution guarantees freedom of thoughts and beliefs and their free expression to everyone. Pursuant to article 35 of the Constitution, the freedom to hold assemblies, meetings, street marches, demonstrations and pickets that do not disturb law and order or violate the rights of other citizens of Belarus shall be guaranteed by the State. The procedure for holding the above-mentioned events shall be determined by law. The author states that these rights can be exercised by Belarusian citizens under any circumstances, subject to the restrictions that are provided in law and are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others.

5.2 The author reiterates his argument that, at the time of his detention and in court, he was not accused of encroaching upon national security or public safety by his actions. Similarly, he was not accused of breaching public order or making threats to the life and health of individuals, to their morals or in breach of their rights and freedoms. The author submits that he was fined for the mere fact of taking part in a "picket", which allegedly was organized without regard for the procedure for conducting mass events.

5.3 The author recalls that article 23.34 of the Code on Administrative Offences does not proscribe mere participation in a mass event. He adds that, at the time of his detention and in court, it was not established that he either organized or led the commemoration. Therefore, as a mere participant in the event, he should not have been taken away from the venue and subjected to an administrative penalty. The author explains that by taking him away from the commemoration, the State party's authorities deprived him of the right to peaceful assembly. The peacefulness of the assembly is demonstrated by its aim of paying tribute to the victims of the Stalinist repressions. The peaceful nature of the commemoration has not been disputed by the police officers who detained the author, the State party's courts that have examined his case or by the State party in its observations to the Committee.

5.4 The author submits that, by breaking up the commemoration, the State party's authorities also deprived him of the right to freedom of expression. He expressed his opinion about past political repression by taking part in the event. He adds that he deliberately chose this way of expressing his opinion because it did not pose any threat to national security or public safety, public order, public health or morals or the rights and freedoms of others. He acknowledges that he was displaying a white-red-white flag — the State party's national flag from 1991 to 1994, at present recognized as a historical national flag — but explains that this flag was never recognized as a forbidden symbol. The author asserts, therefore, that his rights under article 19, paragraph 2, and article 21 of the Covenant have been violated.

5.5 As to the recourse to the Prosecutor's Office under the supervisory review proceedings, the author explains that the formalistic manner by which the Supreme Court addressed his supervisory review appeal had led him to the conviction that the supervisory review institute is not an effective remedy.

Further submissions from the State party

6.1 By note verbale of 14 May 2009, the State party recalls that the Vitebsk District Court of Vitebsk Region found the author guilty under article 23.34, part 1, of the Code on

Administrative Offences and imposed a fine. The State party repeats its reasons for considering the court's decision well founded.

6.2 The State party observes that article 19, paragraph 2, of the Covenant provides that everyone shall have the right to freedom of expression, and that article 21 of the Covenant guarantees the right of peaceful assembly. Nonetheless, the Covenant permits certain restrictions on these rights. The State party has implemented these provisions of the Covenant, including through their incorporation in national law and its Constitution in particular (arts. 33 and 35). Furthermore, article 23 of the Constitution permits restrictions of personal rights and freedoms but only in instances specified by law, in the interest of national security, public order, protection of morals, health of the population, as well as rights and liberties of others. The analysis of article 35 of the Constitution shows that the right to freedom of mass events is proclaimed, but the Constitution also provides for a legislative regulation of the order of their conduct. At present, the organization and conduct of assemblies, meetings, street rallies, demonstrations and pickets is regulated by the Law on Mass Events of 7 August 2003. This law provides for an authorization — and not a notification — system for the conduct of mass events. Restrictions on the conduct of mass events may only be imposed in the cases provided by law, in the interest of national security and public order, in particular under article 23.34 of the Code on Administrative Offences and article 8 of the Law on Mass Events.

6.3 The State party further qualifies as a personal opinion, not corresponding to reality, the author's arguments on the ineffectiveness of the supervisory review proceedings in the framework of administrative offences, which is not grounded in any concrete facts or examples, including of relevance to the merits of the present case. It explains that, under article 12.1 of the Procedural-Executive Code on Administrative Offences, a ruling on an administrative offence can be appealed by the individual against whom the administrative case is opened, an injured party or their representatives or lawyers, while the prosecutors can introduce protest motions against such rulings. A ruling which has entered into legal force can also be re-examined at the prosecutor's protest motion. In 2008, the Prosecutor's Office had received 2,739 complaints regarding rulings in cases of administrative offences. Of those, 422 claims have been satisfied. In 2008, on the sole protest motions of the General Prosecutor's Office, the Supreme Court has annulled and modified 146 rulings concerning cases of administrative offences that had entered into legal force. These numbers demonstrate that the system of prosecutor's supervisory review is sufficiently effective, and each year an important number of administrative offence cases are re-examined based on prosecutor's protest motions.

Issues and proceedings before the Committee

Consideration of admissibility

7.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the case is admissible under the Optional Protocol to the Covenant.

7.2 The Committee has ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

7.3 The Committee notes that the State party has challenged the admissibility of the communication on the ground that the author has not requested the Prosecutor's Office to have his administrative case examined under the supervisory review proceedings and thus, according to the State party, the communication should be declared inadmissible for non-exhaustion of domestic remedies under article 5, paragraph 2 (b), of the Optional Protocol. The Committee also notes the statistics provided to demonstrate that supervisory review was effective in a number of instances (see para. 6.3 above). However, the Committee notes that the State party has not shown whether the procedure has been successfully applied in cases concerning freedom of expression or the right to peaceful assembly, and if so in how many cases. The Committee recalls its jurisprudence, according to which this kind of procedure for the review of court decisions that have entered into force does not constitute a remedy which has to be exhausted for the purposes of article 5, paragraph 2 (b), of the Optional Protocol.[2] In the light thereof, the Committee considers that it is not precluded by the requirements of article 5, paragraph 2 (b), of the Optional Protocol from examining the present communication.

7.4 The Committee considers that the author's claims under article 19, paragraph 2, and article 21 of the Covenant are sufficiently substantiated, for purposes of admissibility, declares them admissible and proceeds to their examination on the merits.

Consideration of the merits

8.1 The Human Rights Committee has considered the communication in the light of all the information made available to it by the parties, as provided for under article 5, paragraph 1, of the Optional Protocol.

8.2 The Committee notes the author's claim that, by breaking up, on 30 October 2007, the commemoration to honour the victims of the Stalinist repressions in Soviet Russia, the State party's authorities violated his right to freedom of expression under article 19, paragraph 2, of the Covenant, since he was taken away from the commemoration and subsequently fined 620,000 Belarusian roubles for publicly expressing personal and other interests during the unauthorized "picket". It further notes the State party's contention that the author was subjected to administrative liability under article 23.34, part 3, of the Code on Administrative Offences for having participated in an unauthorized picket, having previously been sentenced on a different occasion for a breach of the procedure for organizing and holding mass events.

8.3 The first issue before the Committee is whether or not the application of article 23.34, part 3, of the Code on Administrative Offences to the author's case, resulting in the termination of the commemoration and the subsequent fine, constituted a restriction within the meaning of article 19, paragraph 3, of the author's right to freedom of expression. The Committee notes that article 23.34, part 3, of the Code on Administrative Offences establishes administrative liability for violation of the established procedure for organizing or conducting a mass event. It also notes that, since the State party imposed a "procedure for holding mass events", it effectively established restrictions regarding the exercise of the freedom to impart information, guaranteed by article 19, paragraph 2, of the Covenant.[3]

8.4 The second issue is, therefore, whether in the present case such restrictions are justified under article 19, paragraph 3, of the Covenant, i.e. are provided by law and necessary: (a) for respect of the rights or reputations of others; and (b) for the protection of national security or of public order (*ordre public*), or of public health or morals. The Committee recalls that freedom of opinion and freedom of expression are indispensable conditions for the full development of the person, that they are essential for any society, and that they constitute the foundation stone for every free and democratic society.[4] Any restrictions on their exercise must conform to the strict tests of necessity and proportionality and "must be applied only for those purposes for which they were prescribed and must be directly related to the specific need on which they are predicated".[5]

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[2] See, for example, communications No. 1785/2008, *Oleshkevich v. Belarus*, Views adopted on 18 March 2013, para. 7.3; communication No. 1784/2008, *Schumilin v. Belarus*, Views adopted on 23 July 2012, para. 8.3; No. 1814/2008, *P.L. v. Belarus*, decision of inadmissibility, 26 July 2011, para. 6.2.

[3] Communication No. 780/1997, *Laptsevich v. Belarus*, Views adopted on 20 March 2000, para. 8.1.

8.5 The Committee observes that, in the present case, the State party has argued that the provisions of the Law on Mass Events are aimed at creating the conditions for the exercise of the constitutional rights and freedoms of citizens and the protection of public safety and public order in the course of such mass events. The Committee also observes that the author has argued that article 23.34 of the Code on Administrative Offences does not apply to him, since it does not provide for administrative liability for mere participation in a mass event. Furthermore, since commemorations are not governed by Belarusian laws, the participants at the commemoration that took place on 30 October 2007 did not request authorization for the organization of a mass event from the competent authorities. In this regard, the Committee notes that the author and the State party disagree on whether the commemoration in question constituted a "mass event" that was subject to the "procedure for holding mass events" established by the Law on Mass Events, and whether article 23.34 of the Code on Administrative Offences proscribes mere participation in a mass event.

8.6 Even if the sanctions imposed on the author were permitted under national law, the Committee notes that the State party has not advanced any argument as to why they were necessary for one of the legitimate purposes set out in article 19, paragraph 3, of the Covenant, and what dangers would have been created by the author's publicly expressing his negative attitude to the Stalinist repressions in Soviet Russia. The Committee concludes that, in the absence of any pertinent explanations from the State party, the restrictions on the exercise of the author's right to freedom of expression cannot be deemed necessary for the protection of national security or of public order (*ordre public*) or for respect for the rights or reputations of others. The Committee therefore finds that the author's rights under article 19, paragraph 2, of the Covenant have been violated in the present case.

8.7 The Committee further notes the author's claim that his right to freedom of assembly under article 21 of the Covenant was violated, since he was arbitrarily prevented from holding a peaceful assembly. In this context, the Committee recalls that the rights and freedoms set forth in article 21 of the Covenant are not absolute but may be subject to limitations in certain situations. The second sentence of article 21 of the Covenant requires that no restrictions may be placed on the exercise of the right to peaceful assembly other than those imposed (1) in conformity with the law and (2) which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others.[6]

8.8 In the present case, the Committee must consider whether the restrictions imposed on the author's right to freedom of assembly are justified under any of the criteria set out in the second sentence of article 21 of the Covenant. The Committee notes the State party's assertion that the restrictions were in accordance with the law. However, the State party has not provided any information as to how, in practice, the commemoration of the victims of the Stalinist repressions would violate the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others as set out in article 21 of the Covenant. Accordingly, the Committee concludes that in the present case, the State party has also violated the author's right under article 21 of the Covenant.

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[4] See Human Rights Committee, general comment No. 34 (2011) on article 19 on freedoms of opinion and expression, para. 2.

[5] Ibid., para. 22.

[6] See, inter alia, communication No. 1772/2008, *Belyazeka v. Belarus*, Views adopted on 23 March 2012, paragraph 11.7; communication No. 1604/2007, *Zalesskaya v. Belarus*, Views adopted 28 March 2011, para. 10.6.

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation by Belarus of article 19, paragraph 2, and article 21 of the Covenant.

10. Pursuant to article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including reimbursement of the value of the fine as at October 2007, any legal costs incurred by the author and compensation. The State party is also under an obligation to take steps to prevent similar violations in the future.

11. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views, and to have them widely disseminated in Belarusian and Russian in the State party.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

H. Communication No. 1831/2008, *Larbi v. Algeria* (Views adopted on 25 July 2013, 108th session)*

Submitted by:	Djelloul Larbi (represented by TRIAL – Track Impunity Always)
Alleged victims:	Djillali Larbi (the author's father) and the author himself
State party:	Algeria
Date of communication:	24 October 2008 (initial submission)
Subject matter:	Enforced disappearance
Procedural issue:	Exhaustion of domestic remedies
Substantive issues:	Right to life, prohibition of torture and cruel or inhuman treatment, right to liberty and security of person, respect for the inherent dignity of the human person, recognition as a person before the law and the right to an effective remedy; unlawful interference with the home
Articles of the Covenant:	Articles 2 (para. 3), 6 (para. 1), 7, 9 (paras. 1–4), 10 (para. 1) and 16
Article of the Optional Protocol:	Article 5 (para. 2 (b))

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 25 July 2013,

Having concluded its consideration of communication No. 1831/2008, submitted to the Human Rights Committee by Djelloul Larbi under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the authors of the communication and the State party,

Adopts the following:

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* The following members of the Committee participated in the consideration of the present communication: Mr. Yadh Ben Achour, Ms. Christine Chanet, Mr. Ahmed Amin Fathalla, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Walter Kälin, Ms. Zonke Zanele Majodina, Mr. Kheshoe Parsad Matadeen, Mr. Gerald L. Neuman, Sir Nigel Rodley, Mr. Victor Manuel Rodríguez-Rescia, Mr. Fabián Omar Salvioli, Ms. Anja Seibert-Fohr, Mr. Yuval Shany, Mr. Konstantine Vardzelashvili and Ms. Margo Waterval.

Pursuant to rule 90 of the Committee's rules of procedure, Committee member Mr. Lazhari Bouzid did not participate in the consideration of the present communication.

An individual opinion by Mr. Salvioli and Mr. Rodríguez-Rescia is appended to the text of the present Views.

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The author of the communication is Djelloul Larbi, an Algerian citizen born in 1975. He claims that his father, Djillali Larbi, was the victim of violations by Algeria of his rights under articles 2 (para. 3), 6 (para. 1), 7, 9 (paras. 1–4), 10 (para. 1) and 16 of the International Covenant on Civil and Political Rights. The author claims that he himself is the victim of violations by Algeria of his rights under articles 2 (para. 3) and 7 of the Covenant. He is represented by counsel.

1.2 On 5 December 2008, in accordance with rule 92 of its rules of procedure, the Committee, through its Special Rapporteur on new communications and interim measures, asked the State party not to take any measure that might hinder the exercise by the author and his family of their right to submit an individual complaint to the Committee. Accordingly, the State party was requested not to invoke its national legislation, specifically Ordinance No. 06-01 concerning the implementation of the Charter for Peace and National Reconciliation, against the author and members of his family.

1.3 On 12 March 2009, the Committee, through its Special Rapporteur on new communications and interim measures, decided not to examine the admissibility of the communication separately from the merits.

The facts as presented by the author

2.1 In the late morning of 25 May 1994, Djillali Larbi, accompanied by an employee, went by taxi to Mechraa Sfa, a village located approximately 9 kilometres from his farm, to make purchases. A gendarmerie checkpoint had been set up at the entrance to the village. After having his identity papers checked, Djillali Larbi was taken to the local gendarmerie headquarters. According to the author, the arrest was witnessed by an acquaintance of the Larbi family.

2.2 As soon as the author's paternal grandfather heard of his son's arrest, he went to Mechraa Sfa with two other sons and his grandson (the author of this communication). The gendarmes refused to tell him why his son had been arrested and, despite repeated requests, did not allow him to see his son. They did, however, agree to pass him some food and cigarettes.

2.3 On 31 May 1994, the same gendarmes told family members who had gone to visit Djillali Larbi that he had been transferred to the gendarmerie of Mellakou. Djillali Larbi's father, together with his two other sons and the author of the communication, then went to Mellakou, where they were able to see the detainee. Djillali Larbi seemed to have suffered a great deal; his face bore visible signs of blows and he complained that he had been tortured at the gendarmerie of Mechraa Sfa, but added, in the presence of the guards, that he had been well treated since his transfer. He also said that he had made a statement and had asked to be brought before a judge, whereupon he had been assured that legal proceedings would be instituted and that he would appear before the prosecutor as soon as possible. In fact, Djillali Larbi was brought before the public prosecutor of Tiaret on 8 June 1994, after 13 days in custody. Several persons saw him that day in the vehicle that was taking him to the courthouse of Tiaret. He was taken back to the same gendarmerie that same day. Members of his family were allowed to see him during the days that followed. He told them that he had waited several hours at the prosecutor's office, but had not appeared before the prosecutor, who had ordered the gendarmes to "take him back".

2.4 Djillali Larbi remained in custody in Mellakou until 13 June 1994. On 14 June, when his father went to take him food, the gendarmes refused to take it, saying that his son "had been transferred". The family has had no news of him since.

2.5 Djillali Larbi's father and his relatives never stopped searching and making every effort to find him. His father enquired at the gendarmeries and military barracks in the region. He went to Mechraa Sfa, where his son had first been held, as well as to Tiaret and Frenda, after being told that many persons were detained there. As he still had no news, Djillali Larbi's father went to the military headquarters in Oran, where he was advised to enquire at the military prison of Mers El Kebir. He went there three times during the summer and autumn of 1994. He also went to the courthouse of Tiaret, where, after very lengthy formalities, he and the author's mother were received by the public prosecutor, to whom he delivered a written complaint.

2.6 The author's grandfather went back to the same prosecutor on several occasions during the course of 1995. Neither he, nor the author's mother, nor any of the witnesses he had cited and who were familiar with the facts of the case, were asked to appear as part of a criminal investigation. In fact, at no point in time did the prosecution service of Tiaret either order an investigation or offer any explanation as to what had happened to Djillali Larbi.

2.7 In September 1994, the author's grandfather wrote to non-governmental organizations and to the National Observatory for Human Rights, reporting his son's disappearance and petitioning them to intervene.

2.8 After his grandfather's death in 1998, the author of the communication and his mother continued the search for Djillali Larbi. On several occasions they went to the court house of Tiaret to find out what action had been taken on the many complaints they had filed. They gave up, however, after a few months, because the prosecutor refused to receive them or to tell them anything, and because they feared reprisals.

2.9 In 2004, the author wrote once more to the authorities asking for information about what had happened to his father. On 19 May 2004, he wrote to the head of police and to the *wali* (prefect) of the *wilaya* (prefecture) of Tiaret, to the president of the National Advisory Commission for the Promotion and Protection of Human Rights, and to the President of the Republic. He never received a reply. On 29 November 2006, he recounted the numerous efforts already undertaken in a letter to the President of the Republic and the public prosecutor of Tiaret. He also recalled, in a registered letter to the public prosecutor of Tiaret, the many complaints filed over the years by Djillali Larbi's father and the author's mother, to which the prosecutor had never responded. None of these letters received a reply either.

2.10 The author contends that he has not been able to take action through the courts since the promulgation of Ordinance No. 06-01 of 27 February 2006 implementing the Charter for Peace and National Reconciliation, adopted by referendum on 29 September 2005, which prohibits any legal action against members of the Algerian defence and security services in relation to incidents that took place in the country between 1993 and 1998. The author maintains that, since all domestic remedies have proved ineffective and useless, and since Djillali Larbi's relatives are now legally deprived of their right to seek justice, he is no longer obliged to continue to seek domestic remedies and risk criminal prosecution in order to ensure that this communication is admissible before the Committee.

The complaint

3.1 The author alleges that his father was the victim of an enforced disappearance. He considers that, as 14 years have passed since his father's disappearance from the national gendarmerie post in Mellakou, the chances of finding his father alive are very slim. Given his prolonged absence and the circumstances and context of his arrest, it seems likely that he died while in custody. Incommunicado detention entails a high risk of violation of the right to life. The threat posed to the victim's life constitutes a violation of article 6 of the

Covenant insofar as the State failed in its duty to protect the fundamental right to life. Moreover, the State party never made any effort to investigate the fate of the victim, which also constitutes a failure on the State's part to fulfil its obligations under article 6 of the Covenant. The author therefore considers that his father's rights were violated under article 6, in conjunction with article 2, paragraph 3, of the Covenant.

3.2 The author's father told his own father (the author's grandfather) that he had been tortured at the gendarmerie headquarters of Mechraa Sfa, where he was held in custody following his arrest. Moreover, his face bore visible signs of blows. Also, according to the Committee's jurisprudence, the mere fact of subjection to enforced disappearance constitutes inhuman or degrading treatment. The anguish and suffering caused by indefinite detention without contact with the family or the outside world constitutes treatment in breach of article 7 of the Covenant.

3.3 The author's father was arrested by uniformed gendarmes, who did not have a warrant and did not inform him of the reasons for his arrest, which constitutes a violation of his rights under article 9, paragraphs 1 and 2, of the Covenant. He was taken to the courthouse of Tiaret 13 days after his arrest, in other words, beyond the 12-day limit established by law. However, he was never, brought before an officer authorized by law to exercise judicial power (in this case, the public prosecutor of Tiaret), in violation of article 9, paragraph 3, of the Covenant. As a victim of enforced disappearance, he was not physically able to appeal against the lawfulness of his detention, or to request a judge to order his release or even to ask an outside third party to defend him in court; this situation constitutes a violation of article 9, paragraph 4, of the Covenant.

3.4 If it is established that the author's father was the victim of a violation of article 7 of the Covenant, it cannot be argued that he benefited from the protection that article 10, paragraph 1, is intended to provide.

3.5 As the victim of an unacknowledged detention, the author's father was also reduced to the status of a non-person, in violation of article 16 of the Covenant.

3.6 As the victim of an enforced disappearance, Djillali Larbi was unable to exercise his right to challenge the lawfulness of his detention, in violation of article 2, paragraph 3, of the Covenant. His family pursued all legal avenues to discover the truth about his fate, but nothing came of its efforts.

3.7 For the author of the communication, and for the members of his family, the disappearance continues to be a paralysing, painful and distressing ordeal, in that they know absolutely nothing of the fate of Djillali Larbi, in violation of article 7,[1] read in conjunction with article 2, paragraph 3 of the Covenant.

State party's observations on admissibility

4.1 On 3 March 2009, the State party contested the admissibility of the communication and of 10 other communications submitted to the Human Rights Committee, in a "background memorandum on the inadmissibility of communications submitted to the Human Rights Committee in connection with the implementation of the Charter for Peace and National Reconciliation". It submits that communications that incriminate public officials, or persons acting under the authority of government agencies, in cases of enforced disappearance that occurred during the period in question, from 1993 to 1998, should be considered in the broader context of the sociopolitical circumstances and security conditions that prevailed in the country during a time when the Government was struggling to combat a form of terrorism aimed at bringing about the "collapse of the Republican State". In this context, and in accordance with the Constitution (arts. 87 and 91), precautionary measures were implemented, and the Algerian Government informed the Secretariat of the United Nations of its declaration of a state of emergency, in accordance with article 4, paragraph 3, of the Covenant.

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[1] In that regard, the author refers, inter alia, to communication No. 107/1981, *Almeida v. Uruguay*, Views adopted on 21 July 1983; communication No. 992/2001, *Bousroual v. Algeria*, Views adopted on 30 March 2006, para 9.8; communication No. 950/2000, *Sarma v. Sri Lanka*, Views adopted on 16 July 2003, para. 9.5; communication No. 886/1999, *Schedko v. Belarus*, Views adopted on 3 April 2003, para. 10.2; and the concluding observations of the Committee on the second periodic report of Algeria (CCPR/C/79/Add.95), adopted 29 July 1998, para. 10.

4.2 During that period the Government was obliged to combat groups that were not formally organized. Hence there was some confusion in the manner in which a number of operations were carried out among the civilian population, who found it difficult to distinguish between the actions of terrorist groups and those of the security forces, to whom civilians often attributed enforced disappearances. According to the State party, there are numerous explanations for the cases of enforced disappearance, but they cannot be blamed on the Government. According to several independent sources, including the press and human rights organizations, the general concept of disappearance in Algeria during the period in question covers six different scenarios, none of which can be blamed on the State. The first scenario concerns persons reported missing by their relatives but who in fact had chosen to go into hiding in order to join an armed group and asked their families to report that they had been arrested by the security services, as a way of "covering their tracks" and avoiding "harassment" by the police. The second scenario concerns persons who were reported missing after their arrest by the security services but who took advantage of their release to go into hiding. The third scenario concerns persons abducted by armed groups which, because they were not identified or because they had stolen uniforms or identification documents from police officers or soldiers, were mistakenly thought to belong to the armed forces or security services. The fourth scenario concerns persons whose families had reported them as missing, whereas in fact they had abandoned them, and sometimes even left the country, to escape from personal problems or family disputes. A fifth scenario involves persons reported missing by their families but who were in fact wanted terrorists who had been killed and buried in the maquis following factional infighting, doctrinal disputes or arguments over the spoils of war among rival armed groups. The sixth scenario mentioned by the State party concerns persons reported missing who were actually living in Algeria or abroad under a false identity provided by a network of document forgers.

4.3 The State party maintains that it was in view of the diversity and complexity of the situations covered by the general concept of disappearance that the Algerian legislature, following the referendum on the Charter for Peace and National Reconciliation, recommended a comprehensive approach to the issue of enforced disappearances, taking account of — all persons who had disappeared in the context of the "national tragedy" — and under which all victims would be offered support to overcome their ordeal, and all victims of disappearance and their beneficiaries would be entitled to redress. According to statistics from the Ministry of the Interior, 8,023 cases of disappearance have been reported, 6,774 examined, 5,704 approved for compensation and 934 rejected, with 136 still pending. A total of 371,459,390 Algerian dinars has been paid out as compensation to the victims concerned. In addition, a total of 1,320,824,683 dinars has been paid out in the form of monthly pensions.

4.4 The State party further argues that not all domestic remedies have been exhausted. It stresses the importance of distinguishing between simple formalities involving the political or administrative authorities, non-judicial remedies pursued through advisory or mediation bodies, and judicial remedies pursued through the competent courts of justice. The State party observes that, as may be seen from the authors' statements,[2] the complainants have written letters to political and administrative authorities and petitioned advisory and mediation bodies as well as representatives of the prosecution service (chief prosecutors and public prosecutors), but have not actually initiated legal proceedings and seen them through to their conclusion using all available remedies of appeal and judicial review. Of all these authorities, only the representatives of the prosecution service are authorized by law to open a preliminary inquiry and refer a case to the investigating judge. In the Algerian legal system, it is the public prosecutor who receives complaints and who institutes criminal proceedings where warranted. In order to protect the rights of victims and their beneficiaries, the Code of Criminal Procedure authorizes them to sue for damages by filing a complaint with the investigating judge. In this case, it is the victim, not the prosecutor, who initiates criminal proceedings by bringing the matter before the investigating judge. This remedy, provided for in articles 72 and 73 of the Code of Criminal Procedure, was not used, although it would have enabled the victims to institute criminal proceedings and compel the investigating judge to institute criminal proceedings, even if the prosecution service had decided otherwise.

4.5 The State party also notes the author's contention that the adoption by referendum of the Charter for Peace and National Reconciliation and its implementing legislation — in particular, article 45 of Ordinance No. 06-01 — rules out the possibility that any effective and available domestic remedies exist in Algeria to which the families of victims of disappearance could have recourse. On this basis, the author believed that he did not need to bring the matter before the relevant courts, in view of their likely position and findings regarding the application of the ordinance. The author cannot, however, invoke this ordinance and its implementing legislation as a pretext for having failed to institute the legal proceedings available to him. The State party recalls the Committee's jurisprudence to the effect that a person's subjective belief in, or presumption of, the futility of a remedy does not exempt that person from the requirement to exhaust all domestic remedies.[3]

4.6 The State party then turns its attention to the nature, principles and content of the Charter for Peace and National Reconciliation and its implementing legislation. It maintains that, in accordance with the principle of the inalienability of peace, which has become an international right to peace, the Committee should support and consolidate peace and encourage national reconciliation with a view to strengthening States affected by domestic crises. As part of this effort to achieve national reconciliation, the State party adopted the Charter, and its implementing ordinance prescribes legal measures for the discontinuance of criminal proceedings and the commutation or remission of sentences for any person who has been found guilty of acts of terrorism or who is benefiting from the provisions of the legislation on civil dissent, except for persons who have committed or been accomplices in mass killings, rapes or bombings in public places. This ordinance introduces a procedure for filing an official finding of presumed death, which entitles beneficiaries to receive compensation as victims of the "national tragedy". Social and economic measures have also been put in place, including employment placement assistance and compensation for all persons considered victims of the "national tragedy". Finally, the ordinance prescribes political measures, such as a ban on engaging in political activity for any person who exploited religion in the past in a way that contributed to the "national tragedy", and establishes the inadmissibility of any proceedings, individual or joint, brought against members of Algeria's defence and security forces for actions undertaken to protect persons and property, safeguard the nation and preserve its institutions.

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[2] As the State party has provided a common reply to 11 different communications, it refers to the "authors". This reference thus also includes the author of the present communication.

[3] The State party cites, inter alia, communications Nos. 210/1986 and 225/1987, *Pratt and Morgan v. Jamaica*, Views adopted on 6 April 1989.

4.7 In addition to the establishment of funds to compensate all victims of the "national tragedy", the sovereign people of Algeria have, according to the State party, agreed to a process of national reconciliation as the only way to heal the wounds inflicted. The State party insists that the proclamation of the Charter for Peace and National Reconciliation reflects a desire to avoid confrontation in the courts, media outpourings and political score-settling. The State party is therefore of the view that the author's allegations are covered by the comprehensive domestic settlement mechanism provided for in the Charter.

4.8 The State party asks the Committee to note how similar the facts and situations described by the authors are and to take into account the sociopolitical circumstances and security conditions in which they occurred; to find that the author failed to exhaust all domestic remedies; to recognize that the authorities of the State party have established a comprehensive national mechanism for processing and settling the cases referred to in these communications through a policy of peace and national reconciliation that is consistent with the principles of the Charter of the United Nations and subsequent covenants and conventions; to find the communication inadmissible; and to request that the author seek an alternative remedy.

Additional observations by the State party on admissibility

5.1 On 9 October 2009, the State party transmitted an additional memorandum, in which it raises the question of whether the submission of a series of individual communications might not actually amount to an abuse of procedure aimed at bringing before the Committee a broad historical issue whose causes and circumstances elude them. The State party observes in this connection that these "individual" communications dwell on the general context in which the disappearances occurred, focusing solely on the actions of the security forces and never mentioning those of the various armed groups that used criminal concealment techniques to incriminate the armed forces.

5.2 The State party insists that it will not address the merits of these communications until the issue of their admissibility has been settled, since all judicial or quasi-judicial bodies have a duty to deal with preliminary questions before considering the merits. According to the State party, the decision in the cases in point to consider questions of admissibility and the merits jointly and simultaneously — aside from the fact that it was not arrived at on the basis of consultation — seriously prejudices the proper consideration of the communications in terms of both their general nature and their intrinsic particularities. Referring to the rules of procedure of the Human Rights Committee, the State party notes that the sections relating to the Committee's procedure for determining the admissibility of communications are separate from those related to the consideration of communications on the merits, and that therefore these questions could be considered separately. Concerning the exhaustion of domestic remedies, the State party stresses that the author did not submit any complaints or requests for information through channels that would have allowed consideration of the case by the Algerian judicial authorities.

5.3 Recalling the Committee's jurisprudence with respect to the obligation to exhaust domestic remedies, the State party stresses that mere doubts about the prospect of success or concerns about delays do not exempt the author from the obligation to exhaust these remedies. As to the question of whether the promulgation of the Charter for Peace and National Reconciliation has ruled out the possibility of appeal, the State party replies that the failure by the author to submit his allegations to scrutiny has prevented the Algerian authorities from taking a position on the scope and limitations of the applicability of the Charter. Moreover, under the ordinance in question, the only proceedings that are inadmissible are those brought against "members of the defence and security forces of the

Republic" for actions consistent with their core duties to the Republic, namely, to protect persons and property, safeguard the nation and preserve its institutions. On the other hand, any allegations concerning actions attributable to the defence or security forces that can be proved to have taken place in any other context are subject to investigation by the appropriate courts.

5.4 In a note verbale of 6 October 2010, the State party reiterated its earlier arguments against the admissibility of the communication.

Author's comments on the State party's observations

6.1 On 24 April 2013, the author submitted his comments on the State party's observations on admissibility and provided additional arguments on the merits. He points out that the State party has recognized the competence of the Committee to consider individual communications. This competence is of a general nature and its exercise by the Committee is not subject to the discretion of the State party. In particular, it is not for the State party to determine whether it is appropriate for the Committee to take up a specific case. That is for the Committee to decide when it considers the communication. Referring to article 27 of the Vienna Convention on the Law of Treaties, the author considers that the State party's adoption of national legislative and administrative measures to take account of the victims of the "national tragedy" cannot be invoked at the admissibility stage to prevent individuals subject to its jurisdiction from using the procedure provided for under the Optional Protocol. Even if such measures might have an impact on the settlement of the dispute, they must be studied in relation to the merits of the communication and not to its admissibility. In the present case, the legislative measures adopted amount to a violation of the rights enshrined in the Covenant, as the Committee has previously observed.[4]

6.2 The author recalls that Algeria's declaration of a state of emergency on 9 February 1992 does not affect the right of persons to submit individual communications to the Committee. Article 4 of the Covenant allows for derogations from certain provisions of the Covenant during states of emergency, but does not affect the exercise of rights under the Optional Protocol. According to the author, the State party's observations on the appropriateness of the communication do not constitute a ground for inadmissibility.

6.3 The author also refers to the State party's argument that the requirement to exhaust domestic remedies calls on the author to institute criminal proceedings by filing a complaint to sue for damages with the investigating judge, in accordance with articles 72 et seq. of the Code of Criminal Procedure. He refers to an individual communication concerning the State party in which the Committee declared that "the State party has a duty not only to carry out thorough investigations of alleged violations of human rights, particularly enforced disappearances or violations of the right to life, but also to prosecute, try and punish anyone held to be responsible for such violations. To sue for damages for offences as serious as those alleged in the present case cannot be considered a substitute for the charges that should be brought by the public prosecutor."[5] The author therefore considers that, given the serious nature of the alleged offences, it was the responsibility of the competent authorities to take up the case. However, that was not done, even though members of Djillali Larbi's family tried without success, to find out what happened to him after his arrest on 25 May 1994.

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[4] The author refers to the concluding observations of the Human Rights Committee on the third periodic report of Algeria adopted on 1 November 2007, CCPR/C/DZA/CO/3, paras. 7, 8 and 13. He also refers to communication No. 1588/2007, *Benaziza v. Algeria*, Views adopted on 26 July 2010, para. 9.2, and communication No. 1196/2003, *Boucherf v. Algeria*, Views adopted on 30 March 2006, para. 11. The author further refers to the concluding observations of the Committee against Torture on the third periodic report of Algeria, adopted on 13 May 2008, CAT/C/DZA/CO/3, paras. 11, 13 and 17. Lastly, he refers to general comment No. 29 (2001) on derogations from the Covenant during a state of emergency, para. 1 (*Official Documents of the General Assembly, Fifty-sixth session, supplement No. 40*, vol. I (A/56/40 (Vol. I)), annex VI).

[5] Communication No. 1588/2007, *Benaziza v. Algeria*, Views adopted on 26 July 2010, para. 8.3.

6.4 The relatives of Djillali Larbi made enquiries at all the gendarmeries, barracks and military prisons in the region. They sent a written complaint to the public prosecutor of Tiaret, with whom they met on several occasions. They contacted the Algerian League for the Defence of Human Rights, the local chapter and the secretariat of Amnesty International and the National Human Rights Observatory. The victim's family also approached the head of police and the *wali* of the *wilaya* of Tiaret, the president of the National Advisory Commission for the Promotion and Protection of Human Rights and the President of the Republic. No reply was ever received to any of these enquiries. At the request of the victim's wife, an official certificate of his disappearance within the context of the national tragedy was issued by the National Gendarmerie on 2 March 2010. In the spring of 2005, an ad hoc committee of the National Advisory Commission for the Promotion and Protection of Human Rights had received the author's mother and told her in person that the case had been classified as an enforced disappearance. However, she never found out any more about what had happened to Djillali Larbi.

6.5 After submitting the individual communication to the Committee, Djillali Larbi's family continued to petition the Algerian authorities for information about what had happened to him. On 27 November 2010, the family sent a detailed report on his disappearance to the President of the Republic, the Minister of Justice, the Minister of the Interior and Local Government, and the Commander of the National Gendarmerie. After all these initiatives, the victim's wife was interviewed on 11 January 2011 by the public prosecutor of Tiaret. In the report on the interview, she mentions a decision handed down by the Family Affairs Section of the Tiaret public prosecution service on 1 July 2010 that declared her complaint to be admissible in terms of both form and content, which opened the way for a complete investigation into her husband's disappearance, including the hearing of witnesses. Accordingly, on 9 February 2011, two witnesses, a colleague and a neighbour of the victim, were heard by the Family Affairs Section of the Tiaret public prosecution service. They explained that there had been no sign of Djillali Larbi since 1994 and that they knew nothing about what had happened to him since then. This was corroborated by members of the victim's family who were present during the hearings. These many procedures did not lead, however, to a proper investigation, nor to the prosecution and punishment of those responsible for the enforced disappearance, nor to the victim's family obtaining reparation. Consequently, the author cannot be blamed for not having exhausted all legal remedies on the grounds that he did not sue for damages in criminal proceedings by filing a complaint with the investigating judge regarding a human rights violation of such gravity that the State party should not have ignored it.

6.6 As to the State party's argument that mere "subjective belief or presumption" does not exempt the author of a communication from the requirement to exhaust all domestic remedies, the author cites article 45 of Ordinance No. 06-01, which stipulates that no legal proceedings, individual or joint, may be brought against members of the defence or security forces. Any person making such a complaint or allegation is liable to a term of imprisonment of 3 to 5 years or a fine of between 250,000 and 500,000 dinars. The State party has therefore not convincingly demonstrated how suing for damages would have enabled the competent courts to receive and investigate complaints, as that would involve violating article 45 of the ordinance, or how the author of a complaint could have been guaranteed immunity from prosecution under article 46 of the ordinance. As treaty body jurisprudence confirms, a reading of these provisions leads to the conclusion that any complaint regarding the violations imputable to agents of the Algerian State would not only be declared inadmissible, but also treated as a criminal offence. The author notes that the

State party fails to provide an example of any case which, despite the existence of the above-mentioned ordinance, has led to the effective prosecution of the perpetrators of human rights violations in similar circumstances.

6.7 With respect to the merits of the communication, the author notes that the State party has simply listed a number of scenarios according to which the victims of the "national tragedy", in general, might have disappeared. Such general comments do not refute the allegations made in the present communication. In fact the same comments have been put forward in a number of other cases, which shows the State party's continuing unwillingness to consider such cases individually.

6.8 The author recalls that, in accordance with rule 100, paragraph 1, of the Committee's rules of procedure and with the jurisprudence of the treaty bodies, in the absence of observations from the State party on the merits, due weight must be given to the complainant's allegations. The allegations made by the author in his communication are corroborated and substantiated by numerous reports on the security forces' actions during the period under consideration, and by the persistent efforts of members of the victim's family. In view of the State party's involvement in the disappearance of his father, the author is unable to provide additional information in support of his communication, as that information is entirely in the hands of the State party. The author also maintains that the absence of comments on the merits of the communication constitutes tacit acknowledgement of the truthfulness of the allegations it contains.

Issues and proceedings before the Committee

Consideration of admissibility

7.1 The Committee recalls that the decision by the Special Rapporteur to examine the admissibility and the merits jointly (see paragraph 1.3 above) does not preclude their being considered separately by the Committee. Examining the admissibility and the merits jointly does not mean examining them simultaneously. Consequently, before considering any claim contained in a communication, the Committee must first decide, in accordance with rule 93 of its rules of procedure, whether the communication is admissible under the Optional Protocol to the Covenant.

7.2 Pursuant to article 5, paragraph 2 (a), of the Optional Protocol, the Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement.

7.3 The Committee notes that, in the State party's view, the author has not exhausted domestic remedies, since he did not consider the possibility of bringing the matter before the investigating judge and suing for damages in criminal proceedings under articles 72 and 73 of the Code of Criminal Procedure. The Committee also notes that, according to the State party, the author has merely sent letters to political and administrative authorities, and petitioned advisory and mediation bodies as well as representatives of the prosecution service (chief prosecutors and public prosecutors), but has not, strictly speaking, initiated legal action and seen it through to its conclusion by using all available remedies of appeal and judicial review. The Committee notes the author's argument that the family sent a petition to the public prosecutor of Tiaret, with whom members of the family had met on several occasions, and that they contacted the Algerian League for the Defence of Human Rights, the National Observatory for Human Rights, the head of police and the *wali* of the *wilaya* of Tiaret, the president of the National Advisory Commission for the Promotion and Protection of Human Rights and the President of the Republic, without receiving any reply whatsoever. The Committee also notes that the family sent a detailed report on the disappearance of Djillali Larbi to the President of the Republic, the Minister of Justice, the Minister of the Interior and Local Government, and the Commander of the National

Gendarmerie. It also notes that Djillali Larbi's wife was interviewed on 11 January 2011 by the public prosecutor of Tiaret and that, on 9 February 2011, two witnesses were interviewed by the Family Affairs Section of the prosecution service of Tiaret, but that there was no follow-up. The Committee also notes that the numerous procedures undertaken did not lead to a proper investigation, nor to the prosecution and punishment of those responsible for the enforced disappearance, nor to reparation being made to the victim's family. The Committee further takes note of the author's argument that Ordinance No. 06-01 prohibits and penalizes the institution of legal action against any member of the defence or security forces, which therefore releases victims from the obligation to exhaust domestic remedies.

7.4 The Committee recalls that the State party has a duty not only to thoroughly investigate alleged violations of human rights brought to the attention of its authorities, particularly enforced disappearances or violations of the right to life, but also to prosecute, try and punish anyone held to be responsible for such violations.[6] Although Djillali Larbi's family repeatedly contacted the competent authorities concerning his disappearance, the State party failed to conduct a thorough and rigorous investigation into the disappearance of the author's father, even though serious allegations of enforced disappearance were involved. Moreover, the State party has failed to provide sufficient evidence to conclude that an effective remedy is de facto available, given that Ordinance No. 06-01 of 27 February 2006 continues to be applied despite the Committee's recommendations that it should be brought into line with the Covenant (CCPR/C/DZA/CO/3, paras. 7, 8 and 13). The Committee is of the view that to sue for damages for offences as serious as those alleged in the present case cannot be considered a substitute for the charges that should be brought by the public prosecutor.[7] Moreover, given the vague wording of articles 45 and 46 of the ordinance, and in the absence of satisfactory information from the State party about their interpretation and actual enforcement, the author's fears about the effectiveness of filing a complaint are reasonable.

7.5 The Committee considers that, as far as the admissibility of a communication is concerned, the author is obliged to exhaust only the remedies that would effectively provide redress for the alleged violation, in this case, effective remedies for obtaining redress for an enforced disappearance. In the light of all the above considerations, the Committee concludes that article 5, paragraph 2 (b), of the Optional Protocol is not an obstacle to the admissibility of the present communication.

7.6 The Committee finds that the author has sufficiently substantiated his allegations insofar as they raise issues under articles 6, (para. 1), 7, 9, 10, 16 and 2, (para. 3) of the Covenant, and therefore proceeds to consider the communication on the merits.

Consideration of the merits

8.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as required under article 5, paragraph 1, of the Optional Protocol.

8.2 The State party has provided general and collective comments on the serious allegations submitted by authors of several communications, including the author of the present communication. The State party has merely argued that communications incriminating public officials, or persons acting under the authority of government agencies, in cases of enforced disappearances between 1993 and 1998 should be considered within the broader context of the sociopolitical circumstances and security conditions that prevailed in the country during a period when the Government was struggling to combat terrorism. The Committee refers to its jurisprudence[8] and recalls that the State party may not invoke the provisions of the Charter for Peace and National Reconciliation against persons who invoke provisions of the Covenant or who have submitted or may submit communications to the Committee. The Covenant requires the State party to concern itself with the fate of every individual and to treat every individual with respect for the inherent dignity of the human person. Ordinance No. 06-01, without the amendments recommended by the Committee, appears to promote impunity and therefore cannot, as it currently stands, be considered compatible with the Covenant.

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[6] See, for example, communication No. 1791/2008, *Boudjemai v. Algeria*, Views adopted on 22 March 2013, para. 7.4.

[7] See, for example, *Boudjemai v. Algeria*, para. 7.4.

8.3 The Committee notes that the State party has not replied to the author's claims concerning the merits of the case, and recalls its jurisprudence[9] according to which the burden of proof should not rest solely on the author of a communication, especially given that the author and the State party do not always have the same degree of access to evidence and that often only the State party is in possession of the necessary information. It is implicit in article 4, paragraph 2, of the Optional Protocol that the State party has a duty to investigate in good faith all allegations of violations of the Covenant made against it and its representatives and to provide the Committee with whatever information is available to it.[10] In the absence of explanations from the State party in this respect, due weight must be given to the author's allegations, provided they have been sufficiently substantiated.

8.4 The Committee notes that, according to the author, his father, Djillali Larbi, was arrested by gendarmes in the late morning of 25 May 1994 and that his father's employee and a family acquaintance were present at the time. The Committee also notes that, according to the author, the prolonged absence of his father and the circumstances and context of his arrest all suggest that he died in custody. The Committee notes that the State party has produced no evidence refuting the author's allegation. The Committee recalls that, in cases of enforced disappearance, the deprivation of liberty, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate of the disappeared person, removes the person from the protection of the law and places his or her life at serious and constant risk, for which the State is accountable. In the present case, the Committee notes that the State party has produced no evidence to indicate that it has fulfilled its obligation to protect Djillali Larbi's life. Therefore the Committee concludes that the State party has failed in its duty to protect Djillali Larbi's life, in violation of article 6, paragraph 1, of the Covenant.

8.5 The Committee recognizes the degree of suffering involved in being held indefinitely without contact with the outside world. It recalls its general comment No. 20 (1992) on prohibition of torture or cruel, inhuman or degrading treatment or punishment,[11] which recommends that States parties should make provision to ban incommunicado detention. It notes in the present case that Djillali Larbi was arrested by the police on 3 July 1995, that he was tortured at the gendarmerie of Mechraa Sfa, that his face bore visible signs of blows, and that his fate is still unknown. In the absence of a satisfactory explanation from the State party, the Committee considers that these facts constitute a violation of article 7 of the Covenant with regard to Djillali Larbi.[12]

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[8] See, for example, *Boudjemai v. Algeria*, para. 8.2.

[9] See, for example, *Boudjemai v. Algeria*, para. 8.3.

[10] See, for example, *Boudjemai v. Algeria*, para. 8.3.

[11] *Official Documents of the General Assembly, Forty-seventh session, supplement No. 40* (A/47/40), annex VI, section A.

[12] *Boudjemai v. Algeria*, para. 8.5.

8.6 The Committee also takes note of the anguish and distress caused to the author by the disappearance of Djillali Larbi. It considers that the facts before it disclose a violation of article 7 of the Covenant with regard to him.[13]

8.7 With regard to the alleged violation of article 9, the Committee notes the author's allegation that Djillali Larbi was arrested on 25 May 1994 by uniformed gendarmes who did not have a warrant; that he was not informed of the reasons for his arrest; and that he was not charged and was not brought before a judicial authority, which would have enabled him to challenge the lawfulness of his detention. In the absence of a satisfactory explanation from the State party, the Committee finds a violation of article 9 of the Covenant with regard to Djillali Larbi.[14]

8.8 Regarding the complaint under article 10, paragraph 1, the Committee reiterates that persons deprived of their liberty may not be subjected to any hardship or constraint other than that resulting from the deprivation of liberty and that they must be treated with humanity and respect for their dignity. In view of Djillali Larbi's incommunicado detention and in the absence of information provided by the State party in that regard, the Committee finds a violation of article 10, paragraph 1, of the Covenant.[15]

8.9 With regard to the alleged violation of article 16, the Committee reiterates its established jurisprudence, according to which the intentional removal of a person from the protection of the law for a prolonged period of time may constitute a refusal to recognize him or her as a person before the law if the victim was in the hands of the State authorities when last seen and if the efforts of his or her relatives to obtain access to potentially effective remedies, including judicial remedies (Covenant, art. 2, para. 3) have been systematically obstructed.[16] In the present case, the Committee notes that the State party has not provided any information on the whereabouts or fate of the disappeared person despite the repeated requests made by the author and his family to the State party. The Committee concludes that Djillali Larbi's enforced disappearance since 25 May 1994 denied him the protection of the law and deprived him of his right to recognition as a person before the law, in violation of article 16 of the Covenant.

8.10 The author invokes article 2, paragraph 3, of the Covenant, which imposes on States parties the obligation to ensure an effective remedy for all persons whose Covenant rights have been violated. The Committee attaches importance to the establishment by States parties of appropriate judicial and administrative mechanisms for addressing complaints of rights violations. It refers to its general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant,[17] whereby the failure by a State party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant. In this case, the family of the victim contacted the competent authorities, including the public prosecutor of Tiaret and the prosecutor at the court of Tiaret, the head of police and the *wali* of the *wilaya* of Tiaret, the president of the National Advisory Commission for the Promotion and Protection of Human Rights and the President of the Republic, concerning his disappearance, but all these efforts were in vain, and the State party never conducted a thorough and rigorous investigation into the disappearance of the author's father. Furthermore, the absence of the legal right to undertake judicial proceedings since the promulgation of Ordinance No. 06-01 implementing the Charter for Peace and National Reconciliation continues to deprive Djillali Larbi, the author and his family of any access to an effective remedy, since the ordinance prohibits, on pain of imprisonment, the initiation of legal proceedings to shed light on the most serious crimes, such as enforced disappearances (CCPR/C/DZA/CO/3, para. 7). The Committee concludes that the facts before it reveal a violation of article 2 (para. 3) read in conjunction with articles 6 (para. 1), 7, 9, 10 and 16 of the Covenant with regard to Djillali Larbi; and article 2 (para. 3), read in conjunction with article 17 of the Covenant, with regard to the author.

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[13] See, for example, *Boudjemai v. Algeria*, para. 8.6.
[14] See, for example, *Boudjemai v. Algeria*, para. 8.7.
[15] See, for example, *Boudjemai v. Algeria*, para. 8.8.
[16] See, for example, *Boudjemai v. Algeria*, para. 8.9.
[17] *Official Documents of the General Assembly, Fifty-ninth Session, supplement No. 40*, vol. I (A/59/40 (Vol. I)), annex III.

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the information before it discloses violations by the State party of articles 6 (para. 1), 7, 9, 10 (para. 1), 16 and 2 (para. 3), read in conjunction with articles 6 (para. 1), 7, 9, 10 (para. 1) and 16 of the Covenant with regard to Djillali Larbi. The Committee also finds a violation of articles 7 and 2 (para. 3), read in conjunction with article 17, with regard to the author.

10. In accordance with article 2, paragraph 3, of the Covenant, the State party is under an obligation to provide the author and his family with an effective remedy, including by: (a) conducting a thorough and rigorous investigation into the disappearance of Djillali Larbi; (b) providing the author and his family with detailed information about the results of its investigation; (c) releasing him immediately if he is still being detained incommunicado; (d) in the event that Djillali Larbi is deceased, handing over his remains to his family; (e) prosecuting, trying and punishing those responsible for the violations committed; and (f) providing adequate compensation to the author and his family for the violations suffered as well as to Djillali Larbi, if he is still alive. Notwithstanding the terms of Ordinance No. 06-01, the State party should ensure that it does not impede enjoyment of the right to an effective remedy for the victims of crimes such as torture, extrajudicial killings and enforced disappearances. The State party is also under an obligation to prevent similar violations in the future.

11. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether or not there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when a violation has been established, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views and to have them widely disseminated in the official languages of the State party.

[Adopted in English, French and Spanish, the French text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Appendix

Individual opinion of Mr. Fabián Omar Salvioli and Mr. Victor Manuel Rodríguez-Rescia

1. We concur with the decision in communication No. 1831/2008, in which the Human Rights Committee found a violation of the human rights established in articles 6 (para. 1), 7, 9, 10 (para. 1), 16 and 2 (para. 3), read in conjunction with articles 6 (para. 1), 7, 9, 10 (para. 1) and 16 of the Covenant with respect to Djillali Larbi, and a violation of articles 7 and of article 2 (para. 3), read in conjunction with article 7, with respect to the author.

2. However, we are concerned that the Committee's Views on the above-mentioned communication do not recognize as an additional violation of the Covenant the existence of national legal provisions that are inherently inconsistent with the Covenant, namely, articles 45 and 46 of Ordinance No. 06-01.

3. We regret having to insist on a legal assessment that differs from that of the majority of the Committee with regard to the effects of the existence and application of articles 45 and 46 of Ordinance No. 06-01 of 27 February 2006 implementing the Charter for Peace and National Reconciliation, adopted by referendum on 29 September 2005, which prohibit any legal action before the courts against members of the Algerian defence and security services for the offences of torture, extrajudicial execution and enforced disappearance. Under the ordinance, anyone submitting such an allegation or complaint is liable to a penalty of 3 to 5 years' imprisonment and a fine of between 250,000 and 500,000 Algerian dinars.

4. The Committee did not expressly state, as we would have wished, that the content of article 45 of the ordinance is inconsistent with the relevant part of article 14 of the Covenant that relates to the right of access to justice enabling persons to assert their rights before the courts. The Committee should also have found a violation of article 2, paragraph 2, which lays down the obligation for States parties to adapt their national legislation to the standards set by the Covenant.

5. The majority of the Committee maintains the practice of not finding violations of rights that are not invoked by the authors of a communication, thereby failing to apply the legal principle of *iura novit curia*. In so doing, the Committee unjustifiably restricts its own competence in a way that is inappropriate for an international body that protects human rights.

6. It should be noted that this alleged practice is not only based on a misconception but is also applied inconsistently: the Human Rights Committee has itself on occasion applied the principle of *iura novit curia*, although it has not mentioned it explicitly in its Views. In recent years, there have been various examples of the Committee's correct application of the provisions of the Covenant on the basis of evidence, but departing from the legal arguments or the specific articles cited by the parties.[a]

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[a] Human Rights Committee, communication No. 1390/2005, *Koreba v. Belarus*, Views adopted on 25 October 2010; Human Rights Committee, communication No. 1225/2003, *Eshonov v. Uzbekistan*, Views adopted on 22 July 2010, para. 8.3; Human Rights Committee, communication No. 1206/2003, *R.M. and S.I. v. Uzbekistan*, Views adopted on 10 March 2010, paras. 6.3, 9.2, with a finding of no violation; Human Rights Committee, communication No. 1520/2006, *Mwamba v. Zambia*, Views adopted on 10 March 2010; Human Rights Committee, communication No. 1320/2004, *Pimentel et al. v. the Philippines*, Views adopted on 19 March 2007, paras. 3, 8.3; Human Rights Committee,

7. The very existence of articles 45 and 46 of Ordinance No. 06-01, which make complainants of such offences liable to imprisonment and fines, is inconsistent with the International Covenant on Civil and Political Rights, because it establishes a framework of impunity that prevents the investigation, conviction and redress of cases of serious human rights violations, such as the enforced disappearance of Djillali Larbi (the author's father), whose whereabouts are unknown to this day. The legal prohibition on filing a complaint and, therefore, investigating the facts of this case or other similar cases fosters impunity by infringing the right of access to justice, given that the ordinance criminalizes the exercise of the right of petition when a complaint is filed against facts such as those that gave rise to this case, involving an enforced disappearance.

8. The redress measures recommended by the Committee to prevent the recurrence of such acts in other similar cases are insufficient. In its Views, the Committee notes that "the State party should ensure that it does not impede enjoyment of the right to an effective remedy for victims of crimes such as torture, extrajudicial killings and enforced disappearances" (para. 10). We consider in fact that the Committee should have stated clearly and directly that the explicit prohibition under Ordinance No. 06-01 of legal action to initiate investigations of cases of torture, extrajudicial killings and enforced disappearances of persons constitutes a violation of the general obligation under article 2, paragraph 2, of the Covenant, according to which the State of Algeria must "take the necessary steps, in accordance with its constitutional processes and with the provisions of the […] Covenant, **to adopt such laws** or other measures as may be necessary **to give effect to the rights recognized in the present Covenant**" (emphasis added).

9. The provisions of articles 45 and 46 of Ordinance No. 06-01 foster impunity and prevent the victims of this type of serious offence, and their families, from exercising their right to an effective legal remedy, to know the truth, to assert their human right to justice and to petition and obtain full reparation. Even acknowledging the positive contribution of the remaining provisions of Ordinance No. 06-01 to achieving peace and national reconciliation in Algeria, this should not be at the expense of the fundamental human rights of the victims and their families who have suffered the consequences of serious offences, particularly when those families may be liable to penalties and sanctions that victimize them again for exercising their right to invoke a legal remedy, which is, moreover, one of the tools used to protect and guarantee human rights (such as the right to life or the prohibition of torture) that may not be suspended even in a state of emergency (Covenant, art. 4, para. 2).

10. The legal impossibility of initiating judicial proceedings since the promulgation of Ordinance No. 06-01 on the implementation of the Charter for Peace and National Reconciliation has deprived and continues to deprive Djillali Larbi, the author and his family of any access to an effective remedy, since the ordinance prohibits, on pain of imprisonment, the pursuit of legal remedies to shed light on the most serious crimes, such as enforced disappearances.

11. The Committee should have stated explicitly that the State of Algeria, as a reparation measure aimed at ensuring that such acts do not recur, should comply with the provisions of article 2, paragraph 2, and, accordingly, adopt legislative or other measures to repeal articles 45 and 46 of Ordinance No. 06-01 that establish impediments, penalties,

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communication No. 1177/2003, *Ilombe and Shandwe v. the Democratic Republic of the Congo*, Views adopted on 17 March 2006, paras. 5.5, 6.5, 9; Human Rights Committee, communication No. 973/2001, *Khalilova v. Tajikistan*, Views adopted on 30 March 2005, para. 3.7; and Human Rights Committee, communication No. 1044/2000, *Shukurova v. Tajikistan*, Views adopted on 17 March 2006, para. 3.

sanctions and any other obstacle fostering impunity for serious offences such as enforced disappearance of persons, torture and extrajudicial killings, not only for the victims referred to in this communication but also for the victims and families in similar cases.

[Done in English, French and Spanish, the Spanish text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

I. Communication No. 1832/2008, *Al Khazmi v. Libya* (Views adopted on 18 July 2013, 108th session)*

Submitted by:	Ibrahim Aboubakr Al Khazmi (deceased) and his son Khaled Ibrahim Al Khazmi (represented by Al-Karama for Human Rights and TRIAL (Track Impunity Always))
Alleged victims:	Ismail Al Khazmi (the authors' son and brother respectively), and the authors
State party:	Libya
Date of communication:	6 November 2008 (initial submission)
Subject matter:	Enforced disappearance
Procedural issue:	Lack of cooperation from the State party
Substantive issues:	Right to life, prohibition of torture and cruel and inhuman treatment, right to liberty and security of person, right of all persons deprived of their liberty to be treated with humanity and dignity, recognition as a person before the law and right to an effective remedy
Articles of the Covenant:	Articles 2 (para. 3), 6 (para. 1), 7, 9 (paras. 1–4), 10 (para. 1) and 16
Article of the Optional Protocol:	None

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 18 July 2013,

Having concluded its consideration of communication No. 1832/2008, submitted to the Human Rights Committee by Ibrahim Aboubakr Al Khazmi and Khaled Ibrahim Al Khazmi under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

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* The following members of the Committee participated in the examination of the present communication: Mr. Yadh Ben Achour, Mr. Lazhari Bouzid, Mr. Ahmad Amin Fathalla, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Walter Kälin, Ms. Zonke Zanele Majodina, Mr. Kheshoe Parsad Matadeen, Ms. Iulia Antoanella Motoc, Mr. Gerald L. Neuman, Sir Nigel Rodley, Mr. Victor Manuel Rodríguez-Rescia, Mr. Fabián Omar Salvioli, Ms. Anja Seibert-Fohr, Mr. Yuval Shany, Mr. Konstantine Vardzelashvili and Ms. Margo Waterval.

Views under article 5, paragraph 4, of the Optional Protocol

1. The original author of the communication, dated 6 November 2008, was Ibrahim Aboubakr Al Khazmi, a Libyan citizen, who claimed that his son, Ismail Al Khazmi, a Libyan citizen born in 1976 in Beni Al Walid, Libya, was a victim of violations by Libya of articles 2 (para. 3), 6 (para. 1), 7, 9 (paras. 14), 10 (para. 1) and 16 of the Covenant. The original author also claimed that he himself was a victim of a violation of articles 2 (para. 3) and 7 of the Covenant. After the death of the author, Khaled Abubakr Al Khazmi, brother of Ismail Al Khazmi, joined his father as author and formally pursued the procedure before the Committee (see para. 5.1 below). The authors are represented jointly by Al-Karama for Human Rights and TRIAL (Track Impunity Always).

Facts as submitted by the authors

2.1 Ismail Al Khazmi, an oil engineer, was arrested by officials of the State Internal Security Agency (Al Amn Al-Dakhili) on 17 June 2006 at 11 a.m. at his workplace, the AGB Gas Company oil field in Mellitah, Sabratha, and taken to an unknown destination. According to his colleagues, who witnessed the arrest, the members of the Internal Security Agency did not show a warrant or provide Ismail Al Khazmi with any reasons for his arrest. Late at night on the same day, Mubarek Al Khazmi, brother of Ismail Al Khazmi, born in 1978, was arrested at the family home, and taken to Abu Salim prison in Tripoli.

2.2 Although the political activities of Ismail Al Khazmi (if any) are unknown, several factors indicate that he was perceived as a political opponent, and that this was what motivated his arrest by the internal security forces without reason, his secret detention and disappearance and the vetoing at the highest levels of any investigation into his death. The authors add that, within the State party, real or perceived political opposition often leads to harassment, pressure, threats, arbitrary deprivation of liberty, torture or murder for those seen to be opposing the regime, as well as their relatives, leading to a general failure to report human rights violations, for fear of retaliation against victims or their families. This general climate of fear has also inevitably affected the authors, especially considering the fact that Mubarek Al Khazmi, brother of Ismail Al Khazmi, was arrested at the same time. The original author, Ibrahim Aboubakr Al Khazmi, had also been subjected to direct threats and pressure as a result of his requests for information about Ismail Al Khazmi's death.

2.3 Since the arrest of Ismail Al Khazmi, his parents have unsuccessfully sought information about his fate. Despite various appeals by the family, the authorities (who acknowledged the detention of Mubarek, the younger brother) would neither acknowledge Ismail Al Khazmi's detention, nor give any other information about his fate. Witnesses saw Ismail Al Khazmi in the Asseka prison, Tripoli, where he was detained without being brought before a judicial officer or given the opportunity to challenge his detention. He was also denied all contact with his family or a lawyer.

2.4 Former co-prisoners also reported that Ismail Al Khazmi was repeatedly tortured. On 29 June 2006, after being tortured for several consecutive days, Ismail Al Khazmi was again severely beaten in his cell and suspended from the ceiling, in the presence of Tarek Al Marghini Al Tarhouni, an official of the internal security agency, who was in charge of the torture session. The three other officers inflicting the torture were Mohamed Al Kouache, Ahmed Al Fardjani and Fethi Al Qat. Later on the same day, Ismail Al Khazmi was taken away in a Peugeot vehicle to an unknown location, unconscious but still breathing.

2.5 On 1 May 2007, the original author was summoned to Asseka Prison by Commander Mustapha Al Maakef and informed of his son's death. The original author refused to sign a document to release the body for burial from the Tripoli Hospital morgue, demanding to know the date and circumstances of his son's death. Upon receiving only a confused response from the officer, he demanded that an autopsy be performed by a specialist of his choice. The authorities refused to allow an autopsy, which prompted the original author to contact a lawyer to demand one, and initiate proceedings against those responsible for his son's death. The Attorney-General, Mr. Mohamed Khalil, then summoned the senior internal security officers who were posted at Asseka Prison and implicated in the death, in order to hear them on the case. However, General Salih Rajab, the Secretary of the General People's Committee for General Security (in charge of the Ministry of Interior) opposed this, and refused to authorize an investigation.

2.6 The original author also contacted the Secretary of the General People's Committee for Justice (in charge of the Ministry of Justice) concerning his son's case. The Secretary replied, informing the original author that he had written to the Prosecutor General concerning the case of Ismail Al Khazmi. The original author was never informed of any legal proceedings ordered by the Prosecutor's office. On 11 June 2007, the original author submitted a request for a meeting to the Secretary of Justice, to no avail. Despite threats and pressure, the original author has subsequently refused to sign the administrative document releasing the body of Ismail Al Khazmi, until the truth concerning his son's death is known.

2.7 On 11 June 2007, Ismail Al Khazmi's case was presented to the Special Rapporteurs on Torture and on Summary Executions.[1]

The complaint

3.1 The authors claim that they did everything possible to find out what had happened to Ismail Al Khazmi. They pursued all administrative avenues open to them, in particular seeking an autopsy of Ismail Al Khazmi's body, to no avail, as their efforts were obstructed at the highest levels of government. Judicial remedies would have been ineffective owing to the non-independence of the judiciary, and unavailable owing to a widespread fear of reprisals. Accordingly, the authors conclude that judicial remedies were de facto unavailable in this case.

3.2 Ismail Al Khazmi was subjected to enforced disappearance after his arrest on 17 June 2006, and this was followed by a refusal to acknowledge his deprivation of liberty. The authors recall the definition of "enforced disappearance" as set forth in article 2 of the International Convention for the Protection of All Persons from Enforced Disappearance and in article 7, paragraph 2 (i), of the Rome Statute of the International Criminal Court.

3.3 As a victim of enforced disappearance, Ismail Al Khazmi was de facto prevented, in violation of article 2, paragraph 3, of the Covenant, from exercising his right of recourse to challenge the lawfulness of his detention. His relatives did everything in their power to find out what had happened to him, but the State party took no follow-up action, despite its obligation to provide an effective remedy, including through the conduct of an effective investigation.[2]

3.4 The enforced disappearance of Ismail Al Khazmi constituted, in and of itself, a serious threat to his right to life, insofar as the State party failed in its obligation to protect that fundamental right.[3] In addition, the State Party, through its internal security agents, violated Ismail Al Khazmi's right to life by causing his death in detention. The authors state that it was the State party's duty to protect Ismail Al Khazmi's right to life in detention, in view of the responsibility a State takes on by arresting and detaining an individual.[4] Accordingly, the death of Ismail Al Khazmi in detention raises a presumption that the State party's agents holding him bear responsibility for his death. This is especially so in a case such as the present one, where parties do not have equal access to the evidence.[5] According to the authors, the burden to rebut such a presumption, and to provide an alternative explanation for the death of Ismail Al Khazmi rests upon the State party. Ismail Al Khazmi was last seen alive after a particularly severe incident of torture, and taken away in a critical condition by security agents. The original author was subsequently notified of his son's death. From these facts, a reasonable inference can be drawn that the victim's death was caused by the torture he suffered at the hands of State security officers. The State has subsequently failed to undertake an investigation, or even provide an explanation for his death. Accordingly, the State party must be held responsible for a breach of Article 6(1) of the Covenant vis-à-vis Ismail Al Khazmi.

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[1] On 28 June 2007, the Special Rapporteur on extrajudicial, summary or arbitrary executions and the Special Rapporteur on the question of torture submitted a joint allegation letter to the Government of the State party, seeking clarifications on the case of Ismail Al Khazmi. No response was received from the State party.

[2] See communication No. 612/1995, *Vicente et al. v. Colombia*, Views adopted on 29 July 1997.

[3] The authors refer to the Committee's general comment No. 6 on article 6 of the Covenant *(Official Records of the General Assembly, Thirty-seventh Session, Supplement No. 40* (A/37/40), annex V).

3.5 With regard to Ismail Al Khazmi, the mere fact of being subjected to enforced disappearance constitutes inhuman or degrading treatment,[6] which is a violation of article 7 of the Covenant. Ismail Al Khazmi was a victim of enforced disappearance as, following his arrest, he was taken to an undisclosed location by State security officers, after which the authorities would not acknowledge his detention. He was denied any communication with his family or with a lawyer as well as any judicial scrutiny of his detention. Despite numerous attempts, his family was unable to obtain any information on his whereabouts. In addition to the enforced disappearance, according to eye-witnesses, Ismail Al Khazmi was repeatedly beaten and tortured while in Asseka Prison. On the last occasion when he was seen alive by fellow prisoners, internal security officers beat him severely in his cell, as on several consecutive days before, and suspended him from the ceiling. As a result, Ismail Al Khazmi lost consciousness and was taken away. According to the authors, this treatment undoubtedly constitutes a violation of article 7 of the Covenant with respect to Ismail Al Khazmi.

3.6 From the perspective of the authors, the victim's disappearance has been a paralysing, painful and distressing ordeal, since the family have had no news of him since his arrest on 17 June 2006, until they were informed of his death on 1 May 2007.[7] In addition, his relatives continue to suffer psychologically as a result of the authorities' refusal to disclose or investigate the circumstances of his death. Although Ismail Al Khazmi is no longer considered as disappeared, as his death has been confirmed, his family is still experiencing anguish comparable to that caused by disappearance, as it remains unable to obtain information about Ismail Al Khazmi's fate, and the circumstances of his death. The authors accordingly submit that the mental suffering caused by the State's refusal to clarify the circumstances of Ismail Al Khazmi's death also amounts to a continuing breach of article 7 of the Covenant in his regard.

3.7 Ismail Al Khazmi was arrested by the internal security forces without a warrant and without being informed of the reasons for his arrest. This is a breach of article 9, paragraph 1, of the Covenant. He was then arbitrarily detained and has been held incommunicado ever since his arrest on 17 June 2006. He has never been brought before a judicial authority and his detention has never been acknowledged. The authors recall the Committee's jurisprudence according to which the unacknowledged detention of any individual is deemed to be a very serious breach of article 9.[8]

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[4] The authors refer to communication No. 763/1997, *Lantsova v. Russian Federation*, Views adopted on 26 March 2002, para. 9.2.

[5] The authors refer to communication No. 888/1999, *Telitsin v. Russian Federation*, Views adopted on 29 March 2004, para. 7.5.

[6] See communication No. 449/1991, *Mojica v. Dominican Republic*, Views adopted on 15 July 1994; communication No. 540/1993, *Celis Laureano v. Peru*, Views adopted on 25 March 1996; and communication No. 542/1993, *Tshishimbi v. Zaire*, Views adopted on 25 March 1996.

[7] See communication No. 107/1981, *Quinteros v. Uruguay*, Views adopted on 21 July 1983.

3.8 It is furthermore claimed that Ismail Al Khazmi was kept isolated from the outside world during his detention, and was not treated with humanity and with respect for the inherent dignity of the human person, and that he is therefore the victim of a violation of article 10, paragraph 1, of the Covenant.

3.9 As a victim of unacknowledged detention and, as such, a person deprived of the protection of the law, Ismail Al Khazmi has also been reduced to the status of "non-person", in violation of article 16 of the Covenant.

Authors' additional information

4.1 On 2 June 2010, the authors submitted a copy of a report dated 26 March 2009 from the Chief Prosecutor (signed by the Advocate General), addressed to the Secretary of the General People's Committee for Justice. The content of this report can be summarized as follows: On the evening of 30 June 2006, the Chief Prosecutor was informed of the death of Ismail Al Khazmi. In the early hours of 1 July 2006, a member of the Special Prosecutor's Office went to the hospital, examined the body, took note of the wounds, took photographs, and demanded that an autopsy be carried out. After examining the room in which the deceased had been interrogated, the member of the Special Prosecutor's Office noted his observations in a report. He was informed of the decision of the Chief of the internal security agency to set up a commission of inquiry into the death of Ismail Al Khazmi.

4.2 The report further provides that on 15 November 2006, the autopsy report concluded that the direct cause of Ismail Al Khazmi's death was a heart attack, due to a pathological heart condition, and that the wounds suffered by the victim had probably contributed physically and psychologically to his death. After pursuing his investigation, the Prosecutor's Office requested authorization from the Secretary of the General People's Committee for General Security (equivalent of the Minister of Interior), to direct his investigation into three officers of the internal security agency for their direct involvement in the victim's death. On 2 April 2007, this request for investigation was denied by a letter from the Secretary of the General People's Committee for General Security.

4.3 According to the Chief Prosecutor's report, on 30 April 2007, the original author made a request to the Prosecutor's Office to recover his son's body, which was granted. On 5 May 2007, the original author refused to take possession of the body, verbally stating that the cause of his son's death was the torture inflicted upon him. The original author further requested that a new autopsy be carried out by a commission of forensic specialists, without the presence of the doctor who had written the first autopsy report. This request was accepted on the same day by the Prosecutor's Office.

4.4 On 19 September 2007, the Prosecutor's Office received the second autopsy report, which concluded that death was due to injuries inflicted with a hard, blunt object of some sort, which resulted in bruising and contusions all over the body, with subcutaneous hæmorrhage and tearing of the muscles at the site of injury. This caused pathological changes in the kidneys and a deficiency of fluids in the body. As a result, blood circulation and respiration ceased. A communication was sent to the internal security agency to notify the victim's family of the need to recover Ismail Al Khazmi's body. On 17 March 2009, the original author once again refused to recover his son's body without knowing the exact causes of his death, or the identity of those who caused his death. On an unknown date, the Prosecutor's Office decided that no criminal action would be taken against the suspects, in the absence of proper authorization from the General People's Committee for General Security (Ministry of Interior).

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[8] See communication No. 612/1995, *Vicente et al. v. Colombia* (see Note 3 above); communication No. 542/1993, *Tshishimbi v. Zaire* (see Note 7 above); communication No. 540/1993, *Celis Laureano v. Peru* (see Note 7 above); communication No. 563/1993, *Bautista v. Colombia*, Views adopted on 27 October 1995; communication No. 181/1984, *Arévalo Pérez v. Colombia*, Views adopted on 3 November 1989; communication No. 139/1983, *Conteris v. Uruguay*, Views adopted on 17 July 1985; communication No. 8/1977, *Weismann and Perdomo v. Uruguay*, Views adopted on April 1980; and communication No. 56/1979, *Casariego v. Uruguay*, Views adopted on 29 July 1981.

4.5 The authors assert that this document confirms their initial complaint. Their contention that Ismail Al Khazmi was arrested on 17 June 2006 is compatible with the mention, in the report, that the victim died on 30 June 2006, while in the custody of the internal security forces.[9] The report also confirms the authors' assertion that, although the Prosecutor's Office requested the launch of an investigation into Ismail Al Khazmi's death, this request was obstructed by the General People's Committee for General Security, which refused to authorize the investigation. According to the authors, this shows the lack of independence of the judiciary vis-à-vis the executive, and the practical impossibility for the authors to have the rights of Ismail Al Khazmi, and their own rights, including their right to an effective remedy, guaranteed within the State party. The authors reiterate all of their remaining contentions on the merits of their case.

Authors' further submission

5.1 On 1 July 2013, the authors' counsel informed the Committee that the original author had died approximately six months earlier. His son, Khaled Ibrahim Al Khazmi, had agreed to pursue the procedure before the Committee on behalf of his brother Ismail Al Khazmi.

5.2 The authors' counsel further informed the Committee that the family has never managed to recover Ismail Al Khazmi's body, which disappeared from the morgue where it was being kept. The family still does not know the circumstances in which Ismail Al Khazmi's body disappeared, or whether, where or when it was buried. Nor has a prosecution taken place in relation to the circumstances of Ismail Al Khazmi's disappearance and death.

Lack of cooperation from the State party

6. On 5 December 2008, 24 July 2009, 6 May 2010, and 25 January 2011, the State party was requested to submit its observations on the admissibility and merits of the communication. The Committee notes that this information has not been received. It regrets the State party's failure to provide any information on the admissibility and/or merits of the authors' claims. It recalls that, in accordance with article 4, paragraph 2, of the Optional Protocol, the State party concerned is required to submit to the Committee written explanations or statements clarifying the matter and indicating the measures, if any, that have been taken by the State to remedy the situation. In the absence of a reply from the State party, the Committee must give due weight to those of the authors' allegations that have been properly substantiated.[10]

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[9] The authors also refer to a report by Human Rights Watch, "Truth and Justice can't wait – Human Rights Developments in Libya amid institutional obstacles" (December 2009), in which it is stated that Ismail Al Khazmi died under torture after having been arrested in June 2006.

[10] See, inter alia, communication No. 1422/2005, *El Hassy v. Libyan Arab Jamahiriya*, Views adopted on 24 October 2007, para. 4; communication No. 1295/2004, *El Alwani v. Libyan Arab Jamahiriya*,

Issues and proceedings before the Committee

Consideration of admissibility

7.1 Before considering any claim contained in a communication, the Human Rights Committee must decide, in accordance with rule 93 of its rules of procedure, whether the communication is admissible under the Optional Protocol to the Covenant.

7.2 As required under article 5, paragraph 2 (a), of the Optional Protocol, the Committee must ascertain that the same matter is not being examined under another procedure of international investigation or settlement. The Committee notes that the case of Ismail Al Khazmi was reported to the Special Rapporteurs on Torture and Summary Executions. However, it recalls that extra-conventional procedures or mechanisms established by the Commission on Human Rights or the Human Rights Council, and whose mandates are to examine and report publicly on human rights situations in specific countries or territories, or cases of widespread human rights violations worldwide, do not generally constitute an international procedure of investigation or settlement within the meaning of article 5, paragraph 2 (a), of the Optional Protocol.[11] Accordingly, the Committee considers that it is not precluded from examining the case under this provision.

7.3 With regard to the exhaustion of domestic remedies, the Committee reiterates its concern that, in spite of three reminders having been addressed to the State party, no observations on the admissibility or merits of the communication have been received. In the circumstances, the Committee finds that it is not precluded from considering the communication under article 5, paragraph 2 (b), of the Optional Protocol.

7.4 The Committee considers that the authors' allegations have been sufficiently substantiated for purposes of admissibility, and proceeds to its consideration on the merits in respect of the claims made on behalf of Ismail Al Khazmi under articles 2 (para. 3), 6 (para. 1), 7, 9 (paras. 1–4), 10 (para. 1) and 16 of the Covenant, and on his own behalf under articles 7 and 2 (para. 3) of the Covenant.

Consideration of the merits

8.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it, as required under article 5, paragraph 1, of the Optional Protocol. It notes that the State party has not replied to the authors' allegations. In the circumstances, due weight must be given to their allegations to the extent that they have been sufficiently substantiated.

8.2 The Committee notes the claim of the authors that Ismail Al Khazmi was arrested on 17 June 2006 at his workplace by members of the internal security forces, and taken to an unknown destination, in the presence of a number of witnesses. The Committee notes that the family has never received any official confirmation of the place of detention of Ismail Al Khazmi. It recalls that, in cases of enforced disappearance, the act of deprivation of liberty, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate of the disappeared person, denies the person the protection of the law and places

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Views adopted on 11 July 2007, para. 4; communication No. 1208/2003, *Kurbonov v. Tajikistan*, Views adopted on 16 March 2006, para. 4; and communication No. 760/1997, *Diergaardt et al. v. Namibia*, Views adopted on 25 July 2000, para. 10.2.

[11] See, inter alia, communications Nos. 1781/2008, *Berzig v. Algeria*, Views adopted on 31 October 2011, para. 7.2; and 540/1993, *Celis Laureano v. Peru* (see Note 7 above), para. 7.1.

his or her life at serious and constant risk, for which the State is accountable.[12] In addition to the victim's enforced disappearance, the Committee has taken note of the authors' assertion that Ismail Al Khazmi was last seen alive on 29 June 2006, after a severe incident of torture, further to which he was taken by security agents to an unknown location in a critical condition; and that his death was reported to his family by the prison authorities on 1 May 2007. The Committee, recalls, in accordance with its jurisprudence, that the burden of proof cannot rest solely with the authors of the communication, especially when the authors and the State party do not have equal access to the evidence and when the State party is often in sole possession of the relevant information, such as information related to Ismail Al Khazmi's custody, and relevant forensic evidence.[13] The Committee gives due weight to the evidence submitted by the authors, consisting of a report of the Prosecutor's Office dated 26 March 2009, which provides that an autopsy report concluded that Ismail Al Khazmi's death was the consequence of severe injuries suffered by the victim as a result of multiple violent blows to his body with a blunt object. When it received the report, the General People's Committee for General Security refused to open a criminal case against the suspects involved in Ismail Al Khazmi's death. Accordingly, the Committee considers that the inescapable conclusion is that the State party has violated Ismail Al Khazmi's right to life, in breach of article 6, paragraph 1, of the Covenant.

8.3 The Committee recognizes the degree of suffering caused by being held indefinitely without contact with the outside world. It recalls its general comment No. 20 (1992) on article 7,[14] in which it recommends that States parties should make provision against incommunicado detention. It notes in the instant case that Ismail Al Khazmi was arrested on 17 June 2006 and was taken to an undisclosed location by State security officers, after which he was denied any communication with his family. Despite numerous attempts, his family was unable to obtain any information as to his whereabouts. In addition, Ismail Al Khazmi was beaten and tortured while in Asseka Prison, resulting in his death on 30 June 2006, according to an official report from the Prosecutor's Office. The State party has not adduced any information to contradict these facts. The Committee concludes that the incommunicado detention, and lethal torture inflicted on Ismail Al Khazmi constitute multiple violations of article 7 of the Covenant.

8.4 Having reached that conclusion, the Committee decides not to address the authors' allegations under article 10 of the Covenant.

8.5 The Committee also takes note of the anguish and distress caused to the authors by Ismail Al Khazmi's disappearance, followed by a confirmation, only 10 months after its occurrence, of the death of Ismail Al Khazmi. Instead of immediately informing the authors of the death of Ismail Al Khazmi, and launching a thorough investigation with a view to prosecuting the perpetrators, the State party's authorities left the authors without any information about the fate of their relative for 10 months, when they knew that he had died on 30 June 2006, as a result of severe torture inflicted upon him in the Assaka prison. The Committee considers that the facts before it disclose a violation of article 7 of the

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[12] See, inter alia, communication No. 1779/2008, *Mezine v. Algeria*, Views adopted on 25 October 2012, para. 8.4; communication No. 1753/2008, *Guezout et al. v. Algeria*, Views adopted on 19 July 2012, para. 8.4; and communication No. 1781/2008, *Berzig v. Algeria* (see Note 15 above), para. 8.4.

[13] See, inter alia, communication No. 888/1999, *Telitsin v. Russian Federation* (see Note 6 above), paras. 7.5 and 7.6.

[14] *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40* (A/47/40), annex VI, sect. A

Covenant, read alone and in conjunction with article 2, paragraph 3, with regard to the authors.[15]

8.6 With regard to the alleged violation of article 9, the Committee notes the authors' statement that Ismail Al Khazmi was arrested on 17 June 2006 by members of the internal security forces; that he was arrested without a warrant and without being informed of the reasons for his arrest; that Ismail Al Khazmi was neither informed of the charges against him nor brought before a judicial authority through which he would have been able to challenge the lawfulness of his detention; and that no official information was given to the authors regarding the victim's place of detention or his fate. In the absence of a satisfactory explanation from the State party, the Committee finds that there has been a violation of article 9 with regard to Ismail Al Khazmi.[16]

8.7 With regard to the alleged violation of article 16, the Committee reiterates its established jurisprudence, according to which the intentional removal of a person from the protection of the law for a prolonged period of time may constitute a refusal to recognize that person as a person before the law, if the victim was in the hands of the State authorities when last seen, and if the efforts of his or her relatives to obtain access to potentially effective remedies, including judicial remedies, have been systematically impeded.[17] The Committee recalls that Ismail Al Khazmi was arrested on 17 June 2006, and detained, in circumstances which the Committee has found to be arbitrary. He was then subjected to an enforced disappearance, which continued until 1 May 2007, when his family was informed that he had died, and during which he had been subjected to acts of torture which caused his death on 30 June 2006, according to a report of the Office of the Chief Prosecutor. No official investigation was carried out into the circumstances of his death, and no prosecution was initiated. The Committee is of the view, in the circumstances, that Ismail Al Khazmi's right to recognition as a person before the law was violated as a result of his intentional removal from the protection of the law, in breach of article 16 of the Covenant.

8.8 The authors invoke article 2, paragraph 3, of the Covenant, under which States parties have an obligation to ensure an effective remedy for all persons whose Covenant rights have reportedly been violated. The Committee attaches importance to the establishment by States parties of appropriate judicial and administrative mechanisms for addressing claims of rights violations. It refers to its general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant,[18] according to which the failure by a State party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant. In the instant case, the authors initiated legal proceedings, sought the intervention of the General People's Committee for Justice, and requested the initiation of criminal proceedings against suspects in the death of Ismail Al Khazmi after the second autopsy report, which established that he had died as a result of torture, became available. However, all their efforts were to no avail, and the State party failed to conduct a prompt, thorough and impartial investigation and prosecute the perpetrators, despite the presentation of clear evidence from its own authorities, that Ismail

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[15] See communication No. 1913/2009, *Abushaala v. Libya*, Views adopted on 18 March 2013, para. 6.4; No. 1905/2009, *Ouaghlissi v. Algeria*, Views adopted on 26 March 2012, para. 7.6; communication No. 1781/2008, *Berzig v. Algeria* (see Note 15 above), para. 8.6; and communication No. 1640/2007, *El Abani v. Libyan Arab Jamahiriya*, Views adopted on 26 July 2010, para. 7.5.

[16] See, inter alia, communication No. 1913/2009, *Abushaala v. Libya*, Views adopted on 18 March 2013, para. 6.5, No. 1905/2009, *Ouaghlissi v. Algeria* (see Note 18 above), para. 7.7, and communication No. 1781/2008, *Berzig v. Algeria* (see Note 15 above), para. 8.7.

[17] Communication No. 1328/2004, *Kimouche v. Algeria*, Views adopted on 10 July 2007, para. 7.8.

[18] *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 40*, vol. I (A/59/40 (Vol. I)), annex III.

Al Khazmi died as a result of torture inflicted while he was in the State party's custody. The Committee concludes that the facts before it reveal a violation of article 2 (para. 3), read in conjunction with articles 6 (para. 1), 7, 9 and 16 of the Covenant with regard to Ismail Al Khazmi, and of article 2 (para. 3), read in conjunction with article 7 of the Covenant, with respect to the authors.

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the information before it discloses violations by the State party of articles 6 (para. 1), 7, 9, and 2 (para. 3), read in conjunction with articles 6 (para. 1), 7, 9 and 16 of the Covenant with regard to Ismail Al Khazmi; and of article 7, read alone and in conjunction with article 2 (para. 3) of the Covenant, with respect to the authors.

10. In accordance with article 2, paragraph 3, of the Covenant, the State party is under an obligation to provide the authors with an effective remedy by, inter alia: (a) conducting a thorough, prompt and impartial investigation into the disappearance and death of Ismail Al Khazmi; (b) providing his family with detailed information on the results of its investigation; (c) handing over Ismail Al Khazmi's remains to his family; (d) prosecuting, trying and punishing those responsible for the violations committed; and (e) providing compensation to the authors, commensurate to the gravity of the offences committed. The State party is also under an obligation to take steps to prevent similar violations in the future.

11. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether or not there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when a violation has been established, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views and to have them widely disseminated in the official languages of the State party.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

J. Communication No. 1839/2008, *Komarovsky v. Belarus* (Views adopted on 25 October 2013, 109th session)[*]

Submitted by:	Aleksandr Komarovsky (not represented by counsel)
Alleged victim:	The author
State party:	Belarus
Date of communication:	7 August 2008 (initial submission)
Subject matter:	Freedom of expression; peaceful assembly
Procedural issue:	Exhaustion of domestic remedies; level of substantiation of claims
Substantive issues:	Impermissible restrictions to freedoms of expression and peaceful assembly
Articles of the Covenant:	19 (para. 2) and 21
Articles of the Optional Protocol:	2 and 5 (para. 2 (b))

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 25 October 2013,

Having concluded its consideration of communication No. 1839/2008, submitted to the Human Rights Committee by Aleksandr Komarovsky under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author is Aleksandr Komarovsky, a Belarusian national born in 1942. He claims to be a victim of violations by Belarus of his rights under articles 19 (para. 2) and 21 of the International Covenant on Civil and Political Rights.[1] The author is not represented by counsel.

The facts as submitted by the author

2.1 On 8 February 2008, the author, together with three other individuals, requested permission from the Executive Committee of Zhodino City to hold a meeting, to be followed by a street procession and a concert, on 23 March 2008 near the entrance to

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[*] The following Committee members participated in the examination of the present communication: Mr. Yadh Ben Achour, Mr. Lazhari Bouzid, Mr. Ahmad Amin Fathalla, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Walter Kälin, Ms. Zonke Zanele Majodina, Mr. Kheshoe Parsad Matadeen, Mr. Gerald L. Neuman, Sir Nigel Rodley, Mr. Victor Manuel Rodríguez-Rescia, Mr. Fabián Omar Salvioli, Ms. Anja Seibert-Fohr, Mr. Yuval Shany, Mr. Konstantine Vardzelashvili, and Ms. Margo Waterval.

[1] The Optional Protocol entered into force for the State party on 30 December 1992.

Zhodino Park of Culture, on the ninetieth anniversary of the establishment of the People's Republic of Belarus. The meeting and activities were to take place from 3 p.m. to 6 p.m.

2.2 On 21 February 2008, the Executive Committee of Zhodino City informed the applicants, including the author, that on 22 and 23 March 2008 the twenty-fifth republic-wide marathon would be taking place in Zhodino, on its central streets. As no other explanations were provided, the author continued with preparations for a peaceful meeting. On 17 March 2008, the Executive Committee issued an order denying permission to hold the meeting, and thereafter a street procession and a concert, on 23 March 2008, due to the holding of the twenty-fifth national marathon.

2.3 On 19 March 2008, the author and the three other organizers informed the Executive Committee of Zhodino City of their decision to cancel the planned events. They also advised that they were discussing the possibility of holding a peaceful event on the site in front of the SITI shopping centre, the site in the grounds of the GRES shop, the site in front of the Patriot Mother-Kupriyanova sculpture, or in any other location that would not interfere with the marathon.

2.4 On 20 March 2008, the Executive Committee of Zhodino City informed the organizers that it could not examine their request of 19 March 2008, as it did not satisfy the requirements set out in the Law on Mass Events. The author and the other organizers were informed that if they held the meeting on 23 March 2008, it would be considered as an unauthorized mass event.

2.5 The author and the other organizers decided not to hold the event on 23 March 2008. However, in order to inform the persons who were aware of the venue for the 23 March 2008 event that the event had been cancelled, on 23 March at 3 p.m., the author and the other organizers arrived at Zhodino Park of Culture and met some 10 to 15 persons there. More people arrived shortly thereafter. The author and the persons gathered decided to commemorate the heroes who had died during battles fighting for the country and to place flowers at the foot of the Heroes Live Forever obelisk. According to the author, the commemoration and placing of flowers was not a mass event of a political, social or economic nature and it was not necessary to obtain permission in order to conduct such activities.

2.6 A group of around 20 persons walked slowly to the obelisk; some of the younger ones were carrying the historical national flag of Belarus and the flag of the European Union. When some police officers who were standing nearby noticed the flags, they immediately ordered them to be put away. The police officers did not give any orders to the author, and he and the rest of the group reached the obelisk, placed flowers and released red and white balloons. The actions mentioned lasted for approximately five minutes.

2.7 When people started to leave, the author was approached by police officers and was taken to a police station. He was questioned about the meeting and was held at the police station until the morning of the next day. On 24 March 2008, Zhodino City Court of the Region of Minsk concluded that the author had held an unauthorized mass event and ordered him to be held in administrative arrest for a period of seven days. On 25 March 2008, the author appealed the City Court's judgement, at Minsk Regional Court, however on 8 April 2008 the Regional Court upheld the lower court's decision. On 16 May 2008, the author appealed the Regional Court's decision to the Supreme Court, but his appeal was rejected as unfounded on 28 June 2008.

The complaint

3. The author claims violations by the State party of his rights under articles 19 (para. 2) and 21 of the Covenant, as he was detained and punished for participating in a gathering and expressing his opinions on 23 March 2008.

State party's observations on admissibility

4.1 On 19 February 2009, the State party challenged the admissibility of the communication, arguing that the author had failed to exhaust domestic remedies. It recalled that, on 24 March 2008, Zhodino City Court had concluded that the author had committed an administrative offence under article 23.34, paragraph 2, of the Procedural-Executive Code of Administrative Offences, and had imposed on him a penalty of seven days of administrative arrest as he had disregarded the prescribed procedure for organizing and holding a meeting and a street procession. On appeal, on 8 April 2008, Minsk Regional Court had confirmed that decision. On 28 June 2008, the Deputy Chairperson of the Supreme Court had dismissed the author's further appeal.

4.2 The State party notes that the author's appeal to the Supreme Court has never been examined by the Chairperson of the Supreme Court. It explains that, in accordance with the provisions of the administrative law, the author could have appealed the decision of Zhodino City Court to the Chairperson of the Supreme Court, and he could have requested the Prosecutor General to lodge a protest with the Supreme Court in regard to the lower court's decision. Under article 12.11, paragraphs 3 and 4, of the Procedural-Executive Code of Administrative Offences, a complaint (protest) concerning a decision that has been made within the ambit of administrative proceedings and that has entered into force can be reviewed within a period of six months, and a complaint submitted after that deadline has passed cannot be reviewed. The author complained to the Prosecutor's Office about the national courts' decisions, however those decisions were not examined due to the author's failure to pay the required fee. Given that the above-mentioned six-month deadline has passed, the author's complaints challenging the national court's decision to hold him liable for having committed an administrative offence cannot be reviewed. The State party submits that the author did not exhaust all available domestic remedies, and maintains that those remedies would have been accessible and effective.

4.3 The State party further notes that the appeals procedure that exists within the supervisory review proceedings, as provided for in the Procedural-Executive Code of Administrative Offences, is an effective remedy. Under article 12.1 of the Code, a ruling on an administrative offence can be appealed, inter alia, by the individual against whom the administrative case is opened, an injured party, or their representatives or lawyers, whereas the prosecutors can introduce protest motions against such rulings. Article 12.4 of the Code provides, inter alia, that a complaint concerning a ruling on an administrative offence may be lodged within 10 days of the day on which the individual against whom the administrative case has been initiated is notified of it, and within 5 days if the administrative case concerns the imposition of administrative arrest or of deportation. Furthermore, in line with articles 12.5 and 12.6 of the Code, if the persons subject to article 12.1 of the Code were, for justified reasons, unable to meet the aforementioned deadline, they may request the court to determine a new deadline. When a court approves such a request, the execution of the rulings is stayed.

4.4 The State party points out that 2,739 complaints were submitted by individuals to the Prosecutor's Office in 2008 challenging decisions under which they had been held liable for having committed an administrative offence; of these, 422 were upheld. During the same year, some 105 protests were lodged by the Prosecutor's Office to the Supreme Court in regard to administrative cases; the Supreme Court upheld 101 of them.

Author's comments on the State party's observations

5. On 6 May 2009, the author submitted that the remedies mentioned by the State party were not effective and, thus, he did not have to exhaust them. He also notes that he did submit a complaint to the Supreme Court within supervisory proceedings, but that it had been dismissed. He further notes that examination of a case under supervisory review

proceedings is dependent on the discretion of the Chairperson of the Supreme Court, as he or she decides whether to initiate such proceedings. It is clear that the examining of a complaint under supervisory review proceedings is not guaranteed by law; it is not obligatory and requires financial means and, thus, cannot be considered as a precondition to submitting a complaint to an international complaints procedure. In addition, a person who submits a complaint under supervisory review proceedings is not ensured full participation within such proceedings, which is contrary to the principles of openness, equality of arms and publicity. With regard to the statistical data provided by the State party, the author points out that it is not clear how many administrative cases concerning violations of rights guaranteed under the Covenant have been challenged or reviewed under supervisory review proceedings. The author also points out that the State party disregards the Views of the Committee where these are adopted in cases against the State party.

State party's observations on the merits

6.1 On 26 May 2009, the State party submitted its observations on the merits. It notes that article 35 of the Constitution guarantees the freedom to hold assemblies, gatherings, street processions, demonstrations and pickets that do not disrupt public order and do not violate the rights of other citizens. The procedure for holding such events is provided by law. The provisions of the Law on Mass Events are aimed at creating conditions for the realization of citizens' constitutional rights and freedoms and the protection of public safety and public order during the holding of such events on streets and squares and in other public locations. The State party recalls that the author was lawfully found guilty of having committed an administrative offence under article 23.34, paragraph 2, of the Procedural-Executive Code of Administrative Offences (breaching the procedure for organizing and holding a mass event, street procession) and a penalty was imposed on him of seven days' administrative arrest by Zhodino City Court on 24 March 2008. This decision was later upheld by Minsk Regional Court, and the author's appeal to the Supreme Court was dismissed on 28 June 2008. The author did not have authorization to organize such a mass event on 23 March 2008 and he was aware of the prohibition on holding it.

6.2 The State party adds that according to article 19, paragraph 2, of the Covenant, every individual has the right to freedom of expression; this right includes the freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice. However, article 19, paragraph 3, of the Covenant imposes special duties and responsibilities on the rights holder and thus the right to freedom of expression may be subject to certain restrictions that shall be provided by law and are necessary: (a) for respect of the rights or reputations of others; and (b) for the protection of national security or of public order, or of public health or morals. Article 21 of the Covenant recognizes the right to peaceful assembly. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others.

6.3 The State party explains that, as a party to the Covenant, it has incorporated the provisions of articles 19 and 21 into its domestic legal system. In conformity with article 23 of the Constitution, restrictions upon the rights and freedoms of individuals are only permitted in instances specified by the law, in the interest of national security, public order, or the protection of public health or morals, or of the rights and freedoms of other persons. Analysis of article 35 of the Constitution, which guarantees the freedom to hold public events, clearly demonstrates that the Constitution establishes the legal framework for holding such events. The organization and holding of assemblies, gatherings, street processions, demonstrations and pickets is regulated by the Law on Mass Events of 7 August 2003, which requires that prior authorization be obtained to hold such events.

Freedom of expression, as guaranteed under the Constitution, may be subject to restrictions only in instances provided by law, in the interest of national security, public order, or the protection of public health or morals, or of the rights and freedoms of other persons. Therefore, the restrictions provided for under Belarusian law are in conformity with the State party's international obligations, and are aimed at protecting national security and public order: in particular, this concerns the provisions of article 23.34 of the Procedural-Executive Code of Administrative Offences and article 8 of the Law on Mass Events.

Author's comments on the State party's observations

7.1 The author provided his comments on the State party's observations on 21 March 2010. He submits that in light of article 35 of the Constitution of the Republic of Belarus, as well as its obligations under, inter alia, the Covenant, the State party may not interfere arbitrarily with the right of peaceful assembly.

7.2 The author notes that instead of being ensured the rights that are guaranteed under the Covenant, he and the other organizers received punishment by the State party in the form of a seven-day administrative arrest. In this connection, he points out that the national authorities had failed to provide any justification when rejecting their application. In addition, the author notes that in light of the refusal to grant permission to hold the events on 23 March 2008, he, together with the other organizers, decided not to hold them, and they did not hold them.

7.3 As regards the peaceful meeting that took place on 23 March 2008 near the Park of Culture, the author notes that this was merely a meeting of a group of like-minded persons who wished to commemorate the heroes who had fought for the country and to place flowers at the foot of a monument. Such activities, namely to meet with like-minded persons and to place flowers, did not require the obtaining of permission from the authorities.

7.4 The author further notes that the State authorities should apply the Law on Mass Events in such a manner as to facilitate the enjoyment of the rights of freedom of expression and of peaceful assembly. The authorities should not complicate the procedures for enjoyment of the respective rights, but rather simplify them in order to ensure that the rights can be enjoyed in practice. In this regard, the author points out that a system whereby permission must be obtained for organizing and holding mass events in fact disallows the holding of such events, and facilitates broad interpretations by the State authorities of criteria that allow permission to assemble peacefully to be denied. He also points out that in the State party, and in Zhodino in particular, activities organized by civil society and the opposition are constantly prohibited, unlawfully. The State authorities usually do not provide any justification for refusing to allow such activities to be held, or else the refusal is justified on formal shortcomings. The author considers that, in essence, the existing system for obtaining permission to hold a mass event is controlled centrally and is based on ideological considerations.

7.5 The author notes that his punishment in the form of a seven-day administrative arrest constitutes degrading, repressive and discriminatory treatment, and was not necessary for purposes of restrictions permitting interference with the rights of peaceful assembly and of freedom of expression. According to him, none of the individuals who carried balloons and placed flowers at the foot of obelisk on 23 March 2008, a date of national pride and the establishment of the People's Republic of Belarus, and who were later found guilty of committing an administrative offence, endangered national security, public order, the rights and freedoms of others or public health or morals. The author further notes that the State party, in its observations regarding admissibility, arbitrary interprets the provisions of the Covenant and the Optional Protocol thereto, disregarding general comment No. 33 of the Human Rights Committee.

7.6 The author emphasizes that in a democratic country, the right to hold a peaceful mass event may not be restricted arbitrarily, but only on exact and clear grounds, when there are serious reasons for such restrictions. When a country becomes a party to the Covenant and its Optional Protocol, it should respect its obligations thereunder not only in theory, but also in practice. Therefore, rights under the Covenant may not be restricted merely on formalistic grounds. They may be limited only when the restriction is provided by law, it is necessary in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others, and it is necessary in a democratic society. In this regard, the author notes that the State authorities failed to examine the merits of applications from representatives of civil society, instead dismissing them on formalistic grounds. He also notes that in light of the absence in the national laws of a restriction that specifies "which is necessary in a democratic society", any future picket, or decision to commemorate the heroes who fought for the country and died in battle, and to place flowers at the foot of a monument, may be restricted arbitrary in the State party in the interests of "national security and public order".

7.7 Finally, the author points out that the interpretation by the State party of its obligations under the Covenant and its Optional Protocol, as mentioned in its observations on the admissibility of the present communication, in essence results in the violation of the rights mentioned therein.

Issues and proceedings before the Committee

Consideration of admissibility

8.1 Before considering any claim contained in a communication, the Human Rights Committee must decide, in accordance with rule 93 of its rules of procedure, whether the communication is admissible under the Optional Protocol to the Covenant.

8.2 As required under article 5, paragraph 2 (a), of the Optional Protocol, the Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement.

8.3 The Committee takes note of the State party's argument that the author failed to exhaust domestic remedies, as he did not apply for supervisory review proceedings to the Chairperson of the Supreme Court of Belarus and to the Prosecutor's Office. The Committee notes that, according to the materials available on file, it appears that the author made a complaint to the Supreme Court under the supervisory review proceedings, however on 28 June 2008 his appeal was dismissed as unfounded. The Committee further notes that the State party has not indicated whether the procedure before the Prosecutor's Office under the supervisory review proceedings has been successfully applied in cases concerning freedom of expression and the right to peaceful assembly, and has not specified the number of such cases. The Committee recalls its jurisprudence, according to which the State party's supervisory review proceedings, allowing the review of court decisions that have taken effect, does not constitute a remedy that has to be exhausted for the purposes of article 5, paragraph 2 (b), of the Optional Protocol.[2] In the circumstances, the Committee considers that it is not precluded by article 5, paragraph 2 (b), of the Optional Protocol, from examining the present communication.

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[2] See, for example, communication No. 1785/2008, *Olechkevitch v. Belarus*, Views adopted on 18 March 2013, para 7.3; communication No. 1784/2008, *Schumilin v. Belarus*, Views adopted on 23 July 2012, para. 8.3; communication No. 1814/2008, *P.L. v. Belarus*, Decision of inadmissibility, adopted on 26 July 2011, para. 6.2.

8.4 The Committee considers, therefore, that the author has sufficiently substantiated his claims under article 19 (para. 2) and article 21, of the Covenant, for purposes of admissibility. Accordingly, it declares the communication admissible and proceeds to its examination on the merits.

Consideration of the merits

9.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as required under article 5, paragraph 1, of the Optional Protocol.

9.2 The Committee notes the author's claim that he was detained when merely participating in a small gathering on 23 March 2008 at Zhodino Park of Culture in commemoration of national heroes, and that a penalty was subsequently imposed on him of seven days' administrative arrest for an alleged breach of the Law on Mass Events, in violation of his rights under article 19, paragraph 2, of the Covenant. It further notes the State party's contention that the author was administratively sanctioned in accordance with the requirements of national legislation for having breached the procedure for organizing and holding a mass event. In the present case, the Committee has to consider whether the restrictions imposed on the author's right to freedom of expression are justified under any of the criteria set out in article 19, paragraph 3.

9.3 The Committee observes that article 19, paragraph 3, of the Covenant provides for certain restrictions only as provided by law and necessary: (a) for respect of the rights or reputations of others; and (b) for the protection of national security or of public order (ordre public), or of public health or morals. It recalls that freedom of opinion and freedom of expression are indispensable conditions for the full development of the person, and that such freedoms are essential for any society and constitute the foundation stone for every free and democratic society.[3] Any restrictions on the exercise of such freedoms must conform to strict tests of necessity and proportionality and "must be applied only for those purposes for which they were prescribed and must be directly related to the specific need on which they are predicated."[4]

9.4 The Committee notes that the author took part in a small gathering in front of a monument. The author was arrested in this context. He was found guilty of organizing an unauthorized mass event and was sentenced to seven days of administrative arrest. In this connection, the Committee notes the State party's explanation that the Law on Mass Events is aimed at creating conditions for the realization of citizens' constitutional rights and freedoms and for the protection of public safety and public order during the holding of public events on streets and squares and in other public locations, and that the author was administratively sanctioned for having breached the procedure provided for in the above-mentioned law. The Committee notes, however, that the State party does not argue, and nothing in the case file suggests, that the event that took place on 23 March 2008 was in conflict with the twenty-fifth republic-wide marathon. In this regard, it notes that the State party has not sufficiently demonstrated in what way it was necessary to detain and punish the author, in light of his concrete acts on 23 March 2008,[5] under article 19, paragraph 3, of the Covenant, and how it was justified to impose on him a seven-day administrative arrest. In this context, the Committee recalls that it is up to the State party to show that the restrictions on the author's right under article 19 are necessary, and that, even if a State party introduces a system aimed at striking a balance between an individual's freedom to impart information and the general interest in maintaining public order in a certain area, such a system must not operate in a way that is incompatible with article 19 of the Covenant. It therefore concludes that in the circumstances of the present case, the author's rights under article 19, paragraph 2, of the Covenant, have been violated.

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[3] See the Committee's general comment No. 34 (2011) on freedoms of opinion and expression, para. 2. *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 40*, vol. I (A/66/40 (Vol. I)), annex V.

[4] Ibid., para. 22.

[5] See paragraphs 2.1, 2.5 and 2.6 above.

9.5 In view of this conclusion, the Committee decides not to examine separately the author's claim under article 21 of the Covenant.[6]

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the State party has violated the author's rights under article 19, paragraph 2, of the International Covenant on Civil and Political Rights.

11. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including reimbursement of any legal costs incurred by the author, together with adequate compensation. The State party is also under an obligation to take steps to prevent similar violations in the future.

12. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether or not there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when a violation has been established, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views, and to have them widely disseminated in Belarusian and Russian in the State party.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

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[6] See, for example, communication No. 1830/2008, *Pivonos v. Belarus*, Views adopted on 29 October 2012, para. 9.4.

K. Communication No. 1851/2008, *Sekerko v. Belarus* (Views adopted on 28 October 2013, 109th session)*

Submitted by:	Vladimir Sekerko (not represented by counsel)
Alleged victim:	The author
State party:	Belarus
Date of communication:	17 September 2008 (initial submissions)
Subject matter:	Denial of authorization to organize a peaceful meeting
Procedural issue:	Exhaustion of domestic remedies
Substantive issues:	Right of peaceful assembly; permissible restrictions
Articles of the Covenant:	21
Article of the Optional Protocol:	5, para. 2 (b)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 28 October 2013,

Having concluded its consideration of communication No. 1851/2008, submitted to the Human Rights Committee by Vladimir Sekerko under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The author of the communication is Vladimir Sekerko, a Belarusian national, born in 1947. He claims to be a victim of a violation by Belarus of his rights under article 21 of the International Covenant on Civil and Political Rights (hereinafter "the Covenant").[1] The author is not represented.

1.2 On 16 February 2009, the State party requested the Committee to examine the admissibility of the communication separately from its merits, in accordance with rule 97, paragraph 3, of the Committee's rules of procedure. On 6 March 2009, the Committee, acting through its Special Rapporteur on new communications and interim measures, decided to examine the admissibility of the communication together with its merits.

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* The following members of the Committee participated in the examination of the present communication: Mr. Yadh Ben Achour, Mr. Lazhari Bouzid, Mr. Ahmad Amin Fathalla, Mr. Cornelis Flinterman, Mr. Walter Kälin, Ms. Zonke Zanele Majodina, Mr. Kheshoe Parsad Matadeen, Mr. Gerald L. Neuman, Sir Nigel Rodley, Mr. Victor Manuel Rodríguez-Rescia, Mr. Fabián Omar Salvioli, Ms. Anja Seibert-Fohr, Mr. Yuval Shany, Mr. Konstantine Vardzelashvili and Ms. Margo Waterval.

[1] The Optional Protocol entered into force for the State party on 30 December 1992.

The facts as submitted by the author

2.1 The author, together with a group of Gomel city residents (hereinafter "the other applicants"), sought the authorization of the Gomel City Executive Committee to hold mass events in different parts of the city to protest against the abolition of social benefits to people in need. The actions planned by the author were to take place in areas in front of the Palace of Culture of the Vipra Private Unitary Enterprise and the Rechitskiy City Mall. The application was submitted as required by article 5 of the Law on Mass Events in the Republic of Belarus of 30 December 1997 (hereinafter "the Law on Mass Events").

2.2 On 5 December 2007 the Gomel City Executive Committee denied authorization to hold the mass events, noting that the application did not contain the required details related to the planning and conduct of the events, in breach of article 5 of the Law on Mass Events.[2]

2.3 The author and the other applicants complained about the decision of the Gomel City Executive Committee of 5 December 2007 to the Tsentralny District Court of Gomel. In his complaint, the author pointed out that he had specified the required details concerning the planning and conduct of the event in a written undertaking appended to his application to the Gomel City Executive Committee. Therefore, the Gomel City Executive Committee had restricted his right of peaceful assembly without due justification.

2.4 On 1 February 2008, the Tsentralny District Court of Gomel dismissed the author and the other applicants' complaints, noting that the application contained only the undertaking to duly organize the events, whereas the required details related to their planning and conduct were missing therefrom. However, the author argues that the underlying reason for the court decision was that he and the other applicants sought to conduct the events in locations not authorized for meeting purposes, as, pursuant to decision No. 318 of the Gomel Executive Committee of 11 April 2006, a single location was designated for holding mass events in a city of 500,000 inhabitants.[3] The author and the other applicants appealed to the Gomel Regional Court against the decision of the district court.

2.5 On 20 March 2008, the Gomel Regional Court upheld the decision of the Tsentralny District Court of Gomel. Under article 432 of the Belarusian Code of Civil Procedure, the ruling of the appeal court is final and enters into force at the moment of its adoption. According to the ruling of the Gomel Regional Court, the Gomel City Executive Committee denied authorization to the author and the other applicants on the ground that the written undertaking appended to their application to hold events did not contain details related to their planning and conduct, which is a mandatory, essential condition for granting authorizations.

2.6 The author contends that he has exhausted all available and effective domestic remedies.

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[2] The fifth paragraph of article 5 of the Law on Mass Events lists the following, inter alia, as required for the application: purpose, kind, place of holding the mass event; date of its holding, time of its beginning and end; routes of movement; supposed number of participants; name, middle and last name of an organizer (organizers), his/her (their) place of residency and work (study); measures on securing the public order and safety at holding the mass event; measures connected with medical services, cleaning the area after holding the mass event; date of submitting the application.

[3] Pursuant to decision No. 318 of the Gomel Executive Committee of 11 April 2006, mass events shall be held in an area in front of the Palace of Culture of the Vipra Private Unitary Enterprise.

The complaint

3.1 The author claims a violation of his right of peaceful assembly, guaranteed under article 21 of the Covenant. His rights were restricted on the ground that his application to hold a mass event was incomplete and that he intended to conduct one of the events in an unauthorized location. In his opinion, the national authorities, including the domestic courts, did not attempt to justify the restrictions or provide arguments as to the necessity of such restrictions in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others.

3.2 The author maintains that the courts failed to assess the decision of the Gomel Executive Committee with regard to the Covenant's provisions. Pursuant to articles 26 and 27 of the Vienna Convention on the Law of Treaties of 1969, Belarus is bound by the Covenant, should enact it in good faith and may not invoke the provisions of its domestic law as justification for its failure to do so. According to article 15 of the Belarusian Law on International Treaties, universally recognized principles of international law and provisions of international treaties, in force for Belarus, form an integral part of domestic law. The author stresses that the domestic courts restricted his right of peaceful assembly on the ground that he had intended to conduct an event in an unauthorized location, in breach of a by-law. This restriction contradicts the essence of article 21 of the Covenant and the grounds for restriction specified therein.

State party's observations on admissibility

4.1 On 16 February 2009, the State party challenged the admissibility of the communication, arguing that the author had failed to exhaust all available domestic remedies, since his case had not been examined under the supervisory review proceedings through the Prosecutor's Office.

4.2 The State party further submits that the author has not asked the Chairperson of the Gomel Regional Court or the Chairperson of the Supreme Court of Belarus to initiate a supervisory review of the rulings of the Tsentralny District Court of Gomel and the Gomel Regional Court, in accordance with article 439 of the Code of Civil Procedure. Therefore, the author did not avail himself of all available remedies and there is no reason to believe that those remedies would have been unavailable or ineffective.

Author's comments on the State party's observations on admissibility

5. On 5 March 2009, the author recalled that under article 5, paragraph 2 (b), of the Optional Protocol to the Covenant, individuals should exhaust all available domestic remedies before lodging a complaint with the Committee. He notes that the Committee has previously established that, in States parties where the initiation of supervisory review proceedings was dependent on the discretionary power of a judge or prosecutor, the remedies to be exhausted were limited to the cassation appeal. He did not request the Gomel Regional Court or the Supreme Court to initiate supervisory review proceedings as that request would not lead to a re-examination of the case. According to the Committee's jurisprudence, domestic remedies should be both available and effective. By lodging his cassation appeal, the author claims that he has exhausted available domestic remedies. The decision of the lower court became final and entered into force at the moment of the adoption of the appeal court's ruling.

State party's observations on the merits

6.1 On 3 August 2009, the State party submitted its observations on the merits of the case. It reiterates the facts of the case and states that the Gomel City Executive Committee dismissed the author and the other applicants' complaints as the written undertaking enclosed with their applications to hold mass events did not contain all details required for the planning and conduct of such events. Under article 10 of the Law on Mass Events, this information is a mandatory and essential condition for granting authorization to hold a mass event. Furthermore, the courts established that the author and the other applicants had failed to indicate the measures to be taken to guarantee public order and safety, medical care and cleaning of the area during and subsequent to the event, and to submit proofs of payment of the expenses related to the provision of these services. In addition, some of the applicants sought authorization to conduct pickets in unauthorized locations. Under such circumstances, which are not conducive to ensuring public order and public safety, the Tsentralny District Court of Gomel rejected the author and the other applicants' claims by a substantiated decision of 1 February 2008.

6.2 The organization and conduct of mass events is governed by the Law on Mass Events of 30 December 1997. The law aims to create conditions for the realization of constitutional rights and freedoms of citizens, and the protection of public order and public safety when such events are carried out in public spaces. According to the law, "freedom of mass activities not violating the legal order and rights of other citizens of the Republic of Belarus is guaranteed by the State".

6.3 The right of peaceful assembly is enshrined in article 21 of the Covenant. Belarus ratified the Covenant and incorporated its provisions, including articles 19 and 21, into domestic law. In particular, the right to freedom of thought and belief and the right to freedom of expression are guaranteed under article 33 of the Constitution. Article 35 of the Constitution guarantees the right to hold assemblies, meetings, street processions, demonstrations and pickets, provided that they do not violate the law and order or breach the rights of other citizens. At the same time, under article 23 of the Constitution, no restrictions may be placed on rights and freedoms of citizens other than those imposed in conformity with the law, in the interests of national security, public safety, the protection of public health or morals or the protection of the rights and freedoms of others.

Author's comments on the State party's observations on the merits

7.1 On 5 October 2009, the author pointed out that the right protected under article 21 of the Covenant can be restricted only under the requirements listed therein. However, restrictions imposed by States parties on the exercise of the right of peaceful assembly shall not undermine the essence of that right. States parties shall ascertain that the limitations imposed are justified by one of the legitimate aims listed in article 21 of the Covenant.

7.2 The author notes that, even assuming that the written undertaking enclosed with his application to hold a mass event did not provide all necessary information required under article 5 of the Law on Mass Events and that he intended to hold a peaceful event in a location which was not authorized for meeting purposes, the authorities had an opportunity to establish, in consultation with him, measures to protect his right. Pursuant to article 6 of the Law on Mass Events, the head or the deputy head of the local executive committee is entitled to change the date, time and location of the event, upon agreement with the organizers, to ensure the protection of the rights and freedoms of others, public safety and normal functioning of transport and organizations. The author reiterates that the Gomel City Executive Committee denied his request without any justification under article 21 of the Covenant. Therefore, his right of peaceful assembly was breached.

7.3 He adds that, on 2 April 2008, the Gomel City Executive Committee adopted decision No. 299 on mass events in Gomel, imposing a number of restrictions that apply to organizers of peaceful events other than city authorities. Such restrictions put in jeopardy the right of peaceful assembly itself. Thus, the authorities restrict events to a single venue, i.e., an area in front of the Palace of Culture of the Vipra Private Unitary Enterprise on the city outskirts. Furthermore, the decision requires that the organizers conclude agreements with the police, medical services and cleaning agencies prior to the conduct of any public event. Decision No. 299 replaced decision No. 318 of the Gomel City Executive Committee, which also restricted the right of assembly.

7.4 The author maintains that, in the light of the above, the decision of the Gomel City Executive Committee of 2 April 2008 undermines the essence of the right provided for in article 21 of the Covenant and that he has been deprived of the right of peaceful assembly.

Issues and proceedings before the Committee

Consideration of admissibility

8.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

8.2 The Committee has ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

8.3 The Committee takes note of the State party's argument that the author could have requested the Prosecutor's Office, as well as the Chairperson of the Gomel Regional Court or the Chairperson of the Supreme Court, to initiate a supervisory review of the decisions of the Tsentralny District Court of Gomel and the Gomel Regional Court. However, the State party has not substantiated that such review procedures were in fact available and effective. In particular, it has not shown whether and in how many cases supervisory review procedures were applied successfully in cases concerning the right to peaceful assembly. The Committee recalls its previous jurisprudence, according to which the State party's supervisory review procedures against court decisions that have entered into force do not constitute a remedy that has to be exhausted for purposes of article 5, paragraph 2 (b), of the Optional Protocol.[4] In the circumstances, the Committee considers that it is not precluded by article 5, paragraph 2 (b), of the Optional Protocol, from examining the communication.

8.4 The Committee considers that the author has sufficiently substantiated his claim under article 21 of the Covenant, for purposes of admissibility. Accordingly, it declares this claim admissible and proceeds to its examination on the merits.

Consideration of the merits

9.1 The Human Rights Committee has considered the communication in the light of all the information made available to it by the parties, as provided under article 5, paragraph 1, of the Optional Protocol.

9.2 The issue before the Committee is whether the denial of the required authorization of mass events that the author had planned with a group of Gomel city residents constitutes a violation of his rights under article 21 of the Covenant.

9.3 The Committee recalls that the right of peaceful assembly, as guaranteed under article 21 of the Covenant, is a fundamental human right, which is essential for public expression of one's views and opinions and indispensable in a democratic society.[5] This right entails the possibility to organize and participate in a peaceful assembly, including the right to a stationary assembly in a public location (a picket). No restrictions to this right are permissible unless (a) imposed in conformity with the law and (b) they are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others.

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[4] See, for example, communication No. 1785/2008, *Olechkevitch v. Belarus*, Views adopted on 18 March 2013, para 7.3; communication No. 1784/2008, *Schumilin v. Belarus*, Views adopted on 23 July 2012, para. 8.3; communication No. 1841/2008, *P.L. v. Belarus*, decision on inadmissibility of 26 July 2011, para. 6.2.

9.4 The Committee notes that, since the State party imposed a procedure for organizing mass events and denied the author's application for authorization of the planned mass events, it established a restriction on the exercise of the right to freedom of assembly. Therefore it must consider whether the respective restrictions imposed on the author's rights in the present communication are justified under the criteria set out in the second sentence of article 21 of the Covenant. The Committee notes that if the State imposes a restriction, it is up to the State party to show that it is necessary for the aims set out in this provision.

9.5 The Committee has taken note of the State party's explanation that the author was denied authorization to hold mass events as he had failed to provide all necessary information, as required by the Law on Mass Events, including with regard to measures to be taken to guarantee security and medical care to the participants of the events and to ensure that the area remained clean during and subsequent to the gathering. It has also noted the State party's statement that the missing information was not conducive to ensuring public order and public safety and that the law at issue is aimed at creating conditions for the realization of citizens' constitutional rights and freedoms and the protection of public safety and public order when such events are held in public spaces.

9.6 The Committee recalls that, when a State party imposes restrictions with the aim of reconciling an individual's right to assembly and the aforementioned interests of general concern, it should be guided by the aim of facilitating the right, rather than seeking unnecessary or disproportionate limitations to it.[6] Any restriction on the exercise of the right of peaceful assembly must conform to the strict tests of necessity and proportionality.

9.7 The Committee notes that the State party has failed to demonstrate that the denial of authorization in the author's case, even if based on a law, was necessary, for one of the legitimate purposes of the second sentence of article 21 of the Covenant. In particular, the State party has not specified which required details related to the planning and conduct of the mass events might be missing, the absence of which would pose a threat to public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others. Neither has the State party demonstrated that, in the author's case, these purposes could only be achieved by the denial of the planned mass events. Since the State party has failed to show that the denial of authorization met the criteria set out in article 21 of the Covenant, the Committee concludes that the facts as submitted reveal a violation, by the State party, of the author's rights under article 21 of the Covenant.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the State party has violated the author's rights under article 21 of the Covenant.

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[5] See, for example, communication No. 1948/2010, *Turchenyak and others v. Belarus*, Views adopted on 24 July 2013, para. 7.4.

[6] Ibid., para. 7.4.

11. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including reimbursement of the legal costs incurred by the author, as well as adequate compensation. The State party is also under an obligation to take steps to prevent similar violations in the future. In this connection, the Committee reiterates that State party should review its legislation, in particular, the Law on Mass Events of 30 December 1997, as it has been applied in the present case, with a view to ensuring that the right under article 21 of the Covenant may be fully enjoyed in the State party.[7]

12. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when it has been determined that a violation has occurred, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views, and to have them widely disseminated in Belarusian and Russian in the State party.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

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[7] See, for example, communication No. 1948/2010, *Turchenyak and others v. Belarus*, *idem*, para.9; communication No. 1790/2008, *Sergei Govsha, Viktor Syritsa and Viktor Mezyak v. Belarus*, Views adopted on 27 July 2012, para. 11.

L. Communication No. 1856/2008, *Sevostyanov v. Russian Federation* (Views adopted on 1 November 2013, 109th session)*

Submitted by:	Sergei Semenovich Sevostyanov (not represented by counsel)
Alleged victim:	The author
State party:	Russian Federation
Date of communication:	28 November 2006 (initial submission)
Subject matter:	Arbitrary detention; unfair trial
Procedural issue:	Exhaustion of domestic remedies; level of substantiation of a claim
Substantive issues:	Arbitrary detention and the right to challenge detention in court; equality before the courts; presumption of innocence; examination of witnesses; conviction and sentence under review by a higher tribunal
Articles of the Covenant:	9, paragraphs 1 and 4; 14, paragraphs 1, 2, 3 (e) and 5
Article of the Optional Protocol:	2; 5, paragraph 2 (b)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 1 November 2013,

Having concluded its consideration of communication No. 1856/2008, submitted to the Human Rights Committee by Sergei Semenovich Sevostyanov under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Sergei Semenovich Sevostyanov, a citizen of the Russian Federation, born in 1960 and currently imprisoned in the Russian Federation. He claims to be a victim of violations by the State party of his rights under article 9, paragraphs 1 and 4; and article 14, paragraphs 1, 2, 3 (e) and 5 of the International Covenant on Civil and Political Rights.[1] The author is represented by his wife, Mrs. Sevostyanova.

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* The following Committee members participated in the examination of the present communication: Mr. Yadh Ben Achour, Mr. Yuji Iwasawa, Sir Nigel Rodley, Mr. Fabián Omar Salvioli, Mr. Yuval Shany, Mr. Konstantine Vardzelashvili, Mr. Lazhari Bouzid, Mr. Walter Kälin, Mr. Cornelis Flinterman, Ms. Zonke Zanele Majodina, Mr. Gerald L. Neuman, Mr. Victor Manuel Rodríguez-Rescia, Ms. Anja Seibert-Fohr and Ms. Margo Waterval.

[1] The Optional Protocol entered into force for the Russian Federation on 1 January 1992.

Factual background

2.1 On 25 September 2004, the author and his wife were working on his garden plot when a neighbour, Mr. Mikitenko, came and asked the author to accompany him to a neighbouring garden plot. There had been multiple thefts and robberies in the surrounding summer houses and Mr. Mikitenko stated that the perpetrators were hiding at that neighbouring garden plot. Mr. Mikitenko was holding a pack from which a wooden object similar to a handle of an axe could be seen. When the author and Mr. Mikitenko approached the neighbouring garden plot in question, Mr. Mikitenko told the author to wait for him outside, behind the fence, and he entered the house on his own. Several minutes later the author heard the sound of shooting from inside the house and decided to enter. At the doorstep of the house he bumped into Mr. Mikitenko who told him that the two of them should immediately leave. The author looked inside the house and saw two young men, one of whom had a bleeding jaw. The author returned to his garden plot. Shortly thereafter, Mr. Mikitenko passed by the author's garden plot again and told him that he had injured one of the young men and was on his way to call an ambulance.

2.2 The same day, the author was taken to a police station by officers of the Ust-Ilimsk Department of Internal Affairs to give evidence as a witness of the incident and was then released. Mr. Mikitenko was also taken to the same police station and subsequently arrested on the suspicion of having committed the murder of one Mr. Zagrebin.

2.3 On 27 September 2004, the author was again taken to the police station by officers of the Ust-Ilimsk Department of Internal Affairs. While he was waiting in one of the rooms of the police station, an officer present in the same room told him with a smile that his "family tradition was to kill people".[2] Later on, the head of the criminal investigation department entered the room and said in passing that a witness would recognize him. The author was then transferred to another room where an investigator from the Prosecutor's Office announced that they would identify the murderer. The author was then presented, along with two other men (Mr. Mikitenko was not among them), for identification as Mr. Zagrebin's murderer to an eyewitness of the crime, one Mr. Bekreev (the second young man who was inside the house situated on the neighbouring garden plot on 25 September 2004). Two attesting witnesses (observers) were present at the identification procedure. The investigator asked the eyewitness whether he knew any of the men presented to him and the latter pointed in the author's direction. The investigator then asked him whether the author was the one who had a rifle, but the witness replied that he did not know. The investigator asked the same question many times, and eventually the witness hesitantly acknowledged that it was the author who had a rifle. At the end of the identification procedure, the father of the witness, a former police officer, asked the investigator whether he and his son had done everything correctly. The investigator made a sign in the author's direction and led the witness and his father out of the room. The same day, the author orally motioned the investigator to request an expert fingerprint and ballistics (gunpowder residue) examination that would prove that he had never been in possession of the murder weapon. This and all subsequent oral motions on the same matter were rejected by the investigator.

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[2] The author submits that on 23 November 2003, his son, acting in self-defence, had killed one Mr. Peshkov, who was the Deputy Head of Ust-Ilimsk Department on the Fight against Organized Crime. The author maintains that Mr. Peshkov was heavily intoxicated and had opened fire on his unarmed son and his son's friend (who was twice wounded by Mr. Peshkov). The author's son was convicted under article 317 of the Criminal Code (of killing a police officer discharging professional duty) and sentenced to long-term imprisonment. The author claims that "an order" to tamper with his own criminal case was given to Mr. Chelmodeev as revenge by Mr. Knyazev, Head of Ust-Ilimsk Department on the Fight against Organized Crime, who was Mr. Peshkov's direct supervisor.

2.4 The author was kept in detention until the end of the trial. He claims that from 25 December 2004 to 12 January 2005, he was held in custody further to instructions by phone from the investigator.

2.5 The author further submits that in the course of the pretrial investigation, he and his lawyer requested a confrontation between Messrs. Bekreev and Mikitenko, but this investigative action was not granted. On an unspecified date, a confrontation between Mr. Bekreev and the author was arranged and Mr. Bekreev took a piece of paper out of his pocket and read from it, stating that Mr. Zagrebin's fatal wound was inflicted by the author. Mr. Bekreev further stated that on the day in question, the author was wearing a camouflage suit, whereas numerous other witnesses, including Mr. Mikitenko, testified that on the day in question the author was wearing a tracksuit.

2.6 On 31 May 2005, the author was convicted pursuant to article 105, paragraph 1, of the Criminal Code for the premeditated murder of Mr. Zagrebin by the Ust-Ilimsk City Court and sentenced to 10 years' imprisonment in a high-security prison. In the course of the court hearing, both identifying witnesses,[3] who were present during the identification procedure of 27 September 2004, testified that the investigator had exercised pressure on Mr. Bekreev to identify the author. Mr. Mikitenko testified in court that he was wrestling with Mr. Zagrebin over a rifle when a shot occurred and Mr. Zagrebin received his fatal wound. The court, however, concluded that Mr. Mikitenko's self-implication in Mr. Zagrebin's murder was not trustworthy.[4]

2.7 On 6 June 2005, the author appealed the judgement of the Ust-Ilimsk City Court before the Judicial Chamber for Criminal Cases of the Irkutsk Regional Court. In his cassation appeal, the author submitted that the first instance court did not take into account crucial evidence. On 3 November 2005, the Judicial Chamber for Criminal Cases of the Irkutsk Regional Court upheld the judgement of the Ust-Ilimsk City Court.[5]

2.8 On an unspecified date, the author filed a request for supervisory review with the Presidium of the Irkutsk Regional Court. In the request, he, inter alia, challenged the fact that the cassation court disregarded a statement written by Mr. Bekreev, dated 10 August 2005 and addressed to the Ust-Ilimsk Inter-District Prosecutor, in which he admitted that he had been pressured by investigators to lay the blame for Mr. Zagrebin's death on the author. In the same statement Mr. Bekreev stated that Mr. Zagrebin was killed by Mr. Mikitenko, who had entered the house first. On 28 February 2006, a judge of the Irkutsk Regional Court rejected the author's request to initiate a supervisory review procedure.

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[3] See para. 2.3 above.

[4] The investigation against Mr. Mikitenko was discontinued after Mr. Bekreev had identified the author as the perpetrator of the murder.

[5] Insofar as relevant, the 3 November 2005 judgement of the Judicial Chamber for Criminal Cases of the Irkutsk Regional Court [on file] reads as follows: "The author's counsel states in his cassation appeal that witness Mr. Bekreev was pressured during the identification, which was confirmed by Messrs. Dzyuvina and Makhmudova. He also states that witness Mr. Mikitenko, who claimed that he was involved in the crime, knew the consequences of giving false testimony. [...] The [Regional] Court considers the author's contention that eyewitness Mr. Bekreev gave false testimony unsubstantiated. The [City] court's conclusion that there is no reason to distrust Mr. Bekreev's testimony is based on the material of the case. It follows therefrom that the [City] court sufficiently examined and rightly established the facts of the crime committed by Mr. Sevostyanov [the author] as well as the motives thereof. The claim that Mr. Sevostyanov was not involved in Mr. Zagrebin's murder lacks substantiation as the material on file proves, with no doubt, that Mr. Sevostyanov entered Mr. Ignatov's house and, acting intentionally and out of revenge, shot Mr. Zagrebin in the face, which caused acute blood loss and his subsequent death. The Judicial Chamber considers that the [City] court's conclusions as to Mr. Sevostyanov's guilt are accurate and agrees to the court's qualification of the crime under article 105, paragraph 1, of the Criminal Code." (unofficial translation)

2.9 On an unspecified date, the author appealed the 28 February 2006 decision of Irkutsk Regional Court before the Presidium of the same court. The appeal was rejected by the Acting Chairperson of the Irkutsk Regional Court on 20 June 2006.

2.10 On 12 March 2007, the author submitted a request for review in order of supervision to the Supreme Court on the basis of Mr. Bekreev's written statement of 10 August 2005, which, according to the author, constituted "newly discovered evidence".[6] On 23 April 2007, the Supreme Court rejected the author's request. On an unspecified date, the author challenged this decision before the Presidium of the Supreme Court. The author's complaint was rejected by the Presidium of the Supreme Court on 28 January 2008.

2.11 On unspecified dates, the author submitted further requests for review in order of supervision to the Irkutsk Regional Prosecutor's Office and to the General Prosecutor's Office. In its replies, dated 16 February 2007, 9 March 2007 and 18 May 2007, respectively, the Irkutsk Regional Prosecutor's Office stated that there were no grounds to initiate a supervisory review procedure in the author's case. The General Prosecutor's Office also rejected the author's requests on 16 August 2007 and 7 December 2007.

The complaint

3. The author claims that his arrest and trial constitute violations of article 9, paragraphs 1 and 4, and article 14, paragraphs 1, 2, 3 (e) and 5, of the Covenant.

State party's observations on admissibility and merits

4.1 On 9 June 2009, the State party submits that on 25 September 2004, the author and Mr. Mikitenko agreed to find and punish persons who, according to them, were committing thefts from summer houses in the area. They entered one summer house, where they found two unknown adolescents and the author shot one of them in the face with a hunting rifle, which resulted in the adolescent's death. On the same date, the police arrested Mr. Mikitenko. On 27 September 2004, in accordance with article 91 of the Criminal Procedure Code, the police arrested the author, because the second adolescent (Mr. Bekreev) had testified that the author had committed the murder. On 29 September 2004, the Deputy Prosecutor of Ust-Ilimsk filed a motion with the Ust-Ilimsk City Court to order the author's detention on remand. The court postponed the decision, but extended the author's detention by 72 hours, until 2 October 2004. On 2 October 2004, the Ust-Ilimsk City Court ordered the author's detention on remand on suspicion of having committed a murder. On 5 October 2004, the author was charged under article 105, paragraph 1, of the Criminal Code (premeditated murder). On 26 November 2004, the author's detention was extended upon a motion of the Deputy Prosecutor of Ust-Ilimsk until 25 December 2004 by the Ust-Ilimsk City Court. On 22 December 2004, the author and his defence attorney were informed that the preliminary investigation had been finalized and on 24 December 2004, they were presented with the evidence. On 25 December 2004, the Deputy Prosecutor approved the indictment against the author.

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[6] Article 413 of the Criminal Procedure Code, Grounds for Resumption of the Proceedings on a Criminal Case Because of New or Newly Revealed Circumstances, regulates what is considered new evidence and reads as follows:

> "1. The court sentence, ruling or resolution, which has come into legal force, may be cancelled and the proceedings on a criminal case may be resumed because of new or newly revealed circumstances. […]
>
> 3. Seen as the newly revealed circumstances shall be:
>
> 1) a deliberate falsity of the evidence of the victim or of the witness, or of the expert's conclusion, as well as the forgery of the demonstrative proof, of the protocols of the investigative and the judicial actions and of other documents, or a deliberate erroneousness of the translation, which have entailed the passing of an unlawful, unsubstantiated or unjust sentence or of an unsubstantiated ruling or resolution;
>
> 2) the criminal actions of the inquirer, the investigator or the public prosecutor, which have entailed the adjudgement of an unlawful, unsubstantiated or unjust sentence, or of an unlawful or unsubstantiated ruling or resolution;
>
> 3) the criminal actions of the judge which he has committed during the examination of the criminal case, established by the court sentence that has entered into legal force. […]
>
> 5. The circumstances, indicated in the third part of this Article, may be established, in addition to the sentence, by a ruling or a resolution of the court, by a resolution of the investigator or of the inquirer on the termination of the criminal case on account of an expiry of the term of legal limitation, of an act of amnesty or an act of mercy, in connection with the death of the accused or on account of the person not reaching the age, from when the criminal liability sets in." (Criminal Procedure Code of the Russian Federation (Eng.) at Legislationline, available from http://legislationline.org/documents/section/criminal-codes/country/7).

4.2 The State party submits that on 12 January 2005, the author and his attorney were given the indictment and neither made any objections or filed any complaints then or during the court proceedings.

4.3 The State party submits that on 25 December 2004 the author's criminal case was sent to the Ust-Ilimsk City Court, which received it on 21 January 2005, and on 31 January 2005, extended the author's detention and scheduled a preliminary hearing for 7 February 2005. On 7 February 2005, the author's detention was again extended by the court. The author's lawyer appealed on cassation only the 2 October 2004 order for the author's detention. The Judicial College on Criminal Cases of the Irkutsk District Court rejected that appeal on 9 November 2004. Neither the author, nor his lawyer appealed the 26 November 2004 decision to extend his detention. The State party maintains that the author's allegations that his rights under article 9 of the Covenant had been violated are unfounded, because he was detained in accordance with the domestic criminal procedure and could have appealed his detention before the court.

4.4 The State party further submits that on 31 May 2005, the Ust-Ilimsk City Court convicted the author of premeditated murder under article 105, paragraph 1, of the Criminal Code. In determining the length of his sentence the court took into consideration the duration of his detention between 27 September 2004 and 31 May 2005. On 3 November 2005, the Judicial College on Criminal Cases of the Irkutsk District Court rejected the author's appeal against the verdict. The State party submits that the author had appealed his conviction on multiple occasions as well as filed complaints regarding irregular acts of the investigators, prosecution and the court. The State party maintains that the author's complaints have been investigated and rejected.

4.5 The State party submits that Mr. Bekreev's declaration, dated 4 August 2005, that he had wrongly identified the author as the murderer was made after the first instance verdict and therefore could not be taken into consideration by the cassation court.[7] Another declaration by Mr. Bekreev that he had wrongly accused the author was also investigated by the Investigation Department of Ust-Ilimsk Prosecutor's Office, which on 9 January 2008, issued a ruling refusing to open a criminal investigation since it did not find any indication that a crime had been committed. A subsequent complaint by the author, which included an identical declaration by Mr. Bekreev, was investigated in accordance with articles 144 and 145 of the Criminal Procedure Code.[8] On 8 December 2008, the Ust-Ilimsk

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[7] The State party does not explain why the cassation court could not take into consideration Mr. Bekreev's declaration. However, based on the Criminal Procedure Code, it appears that the cassation court is limited to checking the legality, the substantiation and the justness of the sentence, as pronounced by the first instance court, but it does not hear new evidence. Article 360, Limits of an Examination of a Criminal Case by a Court of the Appeals or Cassation Instance, reads as follows:

"1. The court examining a criminal case in accordance with either the appeals or the cassation procedure, shall check the legality, the substantiation and the justness of the sentence and of another judicial decision.

2. The court examining a criminal case in accordance with either the appellate or the cassation procedure, shall only check up the legality, the substantiation and the justness of the sentence in the part in which it is appealed against. If in the course of trying a criminal case there are established circumstances which concern the interests of other persons convicted or acquitted in the same criminal case and in respect of which an appeal or presentation have not been filed, the criminal case has to be likewise checked in respect of these persons. With this, the deterioration of their position shall not be allowable. [...]"

See also articles 373 and 380:

"Article 373. Object of the Judicial Proceedings in a Court of the Cassation Instance

A court of the cassation instance shall verify the legality, the substantiation and the justness of the sentence and of the other court decision by the cassational appeals and presentations."

"Article 380. Non-Correspondence Between the Conclusions of the Court, Expounded in the Sentence, and the Factual Circumstances of the Criminal Case

The sentence is recognized as not corresponding to the factual circumstances of the criminal case, established by the court of the first or of the appeals instance, if:

1) the court conclusions are not confirmed by the proof, examined in the court session;

2) the court has not taken into account the circumstances which could have exerted an essential impact on the court conclusions;

3) in the face of the existence of contradictory proof of essential importance for the court conclusions, it is not indicated in the sentence on what grounds the court has accepted some of them while rejecting the other;

4) the court conclusions, expounded in the sentence, contain essential contradictions, which have exerted or could have exerted an impact on the resolution of the question of the guilt or the innocence of the convict or of the acquitted person, on the correctness of the application of the criminal law or on determining the measure of punishment." (See Criminal Procedure Code at Legislationline, available from http://legislationline.org/documents/section/criminal-codes/country/7.)

[8] The relevant parts of articles 144 and 145 read as follows:

"Article 144. Procedure for Considering the Communication on a Crime

1. An inquirer, inquiry body, investigator, and the head of an investigative body must accept and check information about any crime committed or being prepared and shall, within the competence established by this Code, take a decision on it within three days from the day when such information is received. When checking certain information about a crime, an inquirer, inquiry body, investigator, the head of an investigative body may demand the conduct of documentary checks, audits, examinations of documents, objects, corpses and attract specialists to participation in such checks, audits and examinations, as well as to give instructions in writing on taking operative search measures to an inquiry body to be followed without fail. [...]

4. The applicant shall be issued a document about accepting the communication on a crime with the information on the person who has accepted it and with an indication of the date and the hour of its acceptance.

Prosecutor's Office refused to initiate criminal prosecution against the investigator, because it did not find that any crime had been committed. The Irkutsk District Prosecutor's Office confirmed that decision. The author did not appeal the decision of the Irkutsk District Prosecutor before the court.

4.6 The State party further maintains that the court ensured equality of arms during the trial, that all witnesses requested by the prosecution and the defence were summoned and questioned, and that the defence's arguments that Mr. Mikitenko had committed the murder had been investigated by the court but could not be confirmed because they contradicted other evidence. The State party describes in detail the pretrial investigation against the author. In particular the State party notes that the author's defence attorney had requested exclusion from evidence of the protocol for the identification of the author by the main witness, but the court rejected that motion by rulings dated 2 and 28 March 2005.

4.7 The State party submits that the author twice submitted requests for review in order of supervision of the verdict and the decision of the cassation court against him to the Irkutsk District Court and twice to the Supreme Court. The verdict and decisions were reviewed and the appeals were rejected on 28 February 2006, 20 June 2006, 23 April 2007 and 28 January 2008, respectively. The State party maintains that no violation of the author's rights under the Covenant has taken place.

Author's comments on the State party's observations

5.1 On 30 July 2009, the author submits that during the trial, his lawyer requested that the protocol for the identification of the author by the main witness be excluded from the evidence, but the court rejected the motion; that the witnesses of the identification had testified in court that the investigator had put pressure on the main witness to identify the author as the murderer, but the court chose to interpret their evidence in favour of the prosecution; that he (the author) did not have a lawyer during the identification procedure; that Mr. Mikitenko was not presented to the main witness for identification at the same time as the author; that the State party has argued that he (the author) failed to file certain appeals on time, but that was because he (the author) was not familiar with the criminal

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5. Refusal to accept the communication on a crime may be appealed against with the public prosecutor or with the court in the procedure established by Articles 124 and 125 of the present Code.

6. An application of a victim or his legal representative on criminal cases of private accusation submitted to a court shall be considered by a judge in accordance with Article 318 of this Code. In the cases stipulated by Part four of Article 147 of this Code, and the communication about the crime shall be verified in accordance with the rules established by this Article."

"Article 145. Decisions Taken on the Results of Considering the Communication on a Crime

1. On the results of considering the communication on a crime, the body of inquiry, the inquirer, the investigator, the head of an investigatory agency shall take one of the following decisions:

   1) on the institution of a criminal case in accordance with the procedure established by Article 146 of the present Code;
   2) on the refusal of the institution of a criminal case;
   3) on handing over the communication in accordance with the jurisdiction in conformity with Article 151 of the present Code, and as concerns criminal cases of the private prosecution - to the court, in conformity with the second part of Article 20 of the present Code.

2. The applicant shall be informed about the adopted decision. He shall also be explained his right to appeal against the given decision and the procedure for filing an appeal. [...]" (See Criminal Procedure Code at Legislationline, available from http://legislationline.org/documents/section/criminal-codes/country/7.)

procedure and his lawyer was not competent;[9] that the court failed to take into consideration the testimony of one witness who stated that she had seen the author standing outside the fence at the moment of the murder; that the State party claimed that the main witness was underage and therefore had to be accompanied by his father, but did not mention that the father was a former police officer who wanted to support his colleagues. The author further emphasizes that the main witness, Mr. Bekreev, had written several statements, admitting that he had falsely implicated the author as the perpetrator of the crime, but that the Ust-Ilimsk Prosecutor's Office did not conduct a proper investigation.

5.2 On 30 December 2009, the author submits that he addressed another complaint to the Prosecutor's Office, enclosing Mr. Bekreev's statements of false testimony, and that his complaint was again rejected.[10]

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 As required under article 5, paragraph 2 (a), of the Optional Protocol, the Committee has ascertained that the matter is not being examined under another procedure of international investigation or settlement.

6.3 The Committee considers that the author has sufficiently substantiated, for purposes of admissibility, his claims under article 9, paragraph 1, and article 14, paragraph 5, of the Covenant, and therefore proceeds to their examination on the merits.

6.4 The Committee notes the author's allegations that the criminal charges against him were fabricated by the investigation in revenge for the killing of a police officer by the author's son. The Committee, however, observes that the author's claims under article 14 of the Covenant relate exclusively to the evaluation of facts and evidence by the State party's courts. It recalls that it is generally for the courts of States parties to evaluate facts and evidence in a particular case, unless it can be ascertained that the evaluation was clearly arbitrary or amounted to a denial of justice.[11] The material before the Committee does not contain enough elements to demonstrate that the court proceedings suffered from such defects. Accordingly, the Committee considers that the author has failed to substantiate his claims under article 9, paragraph 4, and article 14, paragraphs 1, 2, 3 (e), of the Covenant and thus declares said claims inadmissible under article 2 of the Optional Protocol.

Consideration of the merits

7.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as required under article 5, paragraph 1, of the Optional Protocol.

7.2 The Committee observes that article 9, paragraph 1, of the Covenant recognizes that everyone has the right to liberty and security of person, and that no one may be subjected to arbitrary arrest or detention. However, this article provides for certain permissible limitations on this right, by way of detention where the grounds and procedures for doing so are established by law. The Committee notes the author's allegation that from 25 December 2004 to 12 January 2005, he was kept in custody arbitrarily further to a phone instruction from the investigator. The Committee also takes note of the State party's submission that neither the author, nor his lawyer had appealed the 26 November 2004 decision for his detention. The Committee, however, observes that the above decision according to the State party's submission extended the author's detention to 25 December 2004, and that the next decision to extend the author's detention was not taken by the court until 31 January 2005. The Committee finds that, in the absence of a court decision for his detention, the author was detained arbitrarily for that period in violation of his rights under article 9, paragraph 1, of the Covenant.

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[9] The lawyer was privately retained by the author.

[10] The author submits a copy of the response from the Irkutsk District Prosecutor's office, dated 15 October 2009, which states that it had already investigated an identical complaint and on 8 December 2008 it had issued a decision not to open a criminal investigation since no crime was committed.

[11] See, inter alia, communication No. 541/1993, *Errol Simms v. Jamaica*, decision of inadmissibility adopted on 3 April 1995, para. 6.2.

7.3 The Committee notes the author's allegation that the appellate court did not conduct a full review of the criminal case against him, in violation of article 14, paragraph 5, of the Covenant, since it did not take into account Mr. Bekreev's written statement of 10 August 2005, in which he admitted that he laid the blame for Mr. Zagrebin's death on the author, because he had been pressured by the investigator and that the actual killer was Mr. Mikitenko. The Committee also notes the State party's submission that the appellate court, in accordance with the criminal procedural law, could not take into consideration the above-mentioned statement because it was made after the first instance court had issued the verdict. The Committee observes that under article 14, paragraph 5, of the Covenant, a higher tribunal must review the conviction and sentence, but is not required to proceed to a factual retrial. However, this provision imposes on the State party the duty to review substantively, both on the basis of sufficiency of evidence and of law, the conviction and sentence such that the procedure allows for due consideration of the nature of the case. A review that is limited to the formal or legal aspects of the conviction without any consideration whatsoever of the facts is not sufficient under the Covenant.[12] The Committee notes that in the present case, the appellate court (see para. 2.7 above), despite the limitations imposed on it by procedural law with regard to the examination of facts, not only considered the grounds for cassation submitted by the author in his appeal in general, but also examined the evidence reviewed by the first instance court, upheld, in particular, that court's conclusion that there was no reason to distrust Mr. Bekreev's initial testimony, and concluded that the conclusions of the contested judgment regarding the facts of the case and the guilt of the author were well reasoned. In the light of the circumstances of the case, the Committee is of the view that the facts before it do not reveal any violation of article 14, paragraph 5, of the Covenant.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose violations of the author's rights under article 9, paragraph 1, of the Covenant.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under the obligation to provide the author with an effective remedy, which should include adequate and appropriate compensation. The State party is under the obligation to avoid similar violations in the future.

10. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a

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[12] See the Committee's general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, para. 48, *Official Records of the General Assembly, Sixty-second Session, Supplement No. 40*, vol. I (A/62/40 (Vol. I)), annex VI.

violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when a violation has been established, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to its Views. The State party is also requested to publish the present Views and to have them widely disseminated in the official language of the State party.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

M. Communication No. 1864/2009, *Kirsanov v. Belarus* (Views adopted on 20 March 2014, 110th session)*

Submitted by:	Vladimir Kirsanov (not represented by counsel)
Alleged victims:	The author
State party:	Belarus
Date of communication:	22 November 2008 (initial submissions)
Subject matter:	Denial of authorization to organize a peaceful meeting
Procedural issue:	Exhaustion of domestic remedies
Substantive issues:	Right of peaceful assembly; permissible restrictions
Articles of the Covenant:	21
Article of the Optional Protocol:	5, para. 2 (b)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 20 March 2014,

Having concluded its consideration of communication No. 1864/2009, submitted to the Human Rights Committee by Vladimir Kirsanov under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Vladimir Kirsanov, a Belarusian national, born in 1937. He claims that he is the victim of a violation by Belarus of his rights under article 21 of the International Covenant on Civil and Political Rights (hereinafter "the Covenant"). The Optional Protocol entered into force for the State party on 30 December 1992. The author is not represented.

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* The following members of the Committee participated in the examination of the present communication: Mr. Yadh Ben Achour, Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Ms. Zonke Zanele Majodina, Mr. Gerald L. Neuman, Sir Nigel Rodley, Mr. Victor Manuel Rodríguez-Rescia, Mr. Fabián Omar Salvioli, Ms. Anja Seibert-Fohr, Mr. Yuval Shany, Mr. Konstantine Vardzelashvili, Ms. Margo Waterval and Mr. Andrei Paul Zlătescu.

The text of an individual opinion by Committee members Mr. Salvioli and Mr. Rodríguez-Rescia is appended to the present Views.

The facts as presented by the author

2.1 On 14 January 2008, the author sought authorization to hold a stationary demonstration (a picket), on 30 January 2008, with the aim of attracting public attention to the State party's policy against opposition political parties and grass-roots movements and also to protest against the State party's attempt to dismantle the Belarus Communist Party. The author was a member of the Belarus Communist Party at the time of the events. On 22 January 2008, the Zhlobinsky District Executive Committee of the Gomel Region ("the Executive Committee") denied authorization to him on the ground that there was no reason to hold the event, as the Supreme Court had stayed the activities of the Belarus Communist Party for six months, by a decision of 2 August 2007.

2.2 The author complained to the Zhlobinsky District Court ("the District Court") about the Executive Committee's refusal. On 3 March 2008, the District Court dismissed his complaint, indicating that the stay of the Communist Party's activities was a sufficient ground to limit his right to hold a peaceful assembly. On 10 April 2008, the Gomel Regional Court upheld the decision of 3 March 2008 on appeal and it became final.[1]

2.3 The author claims that he has exhausted all available domestic remedies. He also argues that, although he does not consider supervisory review proceedings to be an effective remedy, he requested the Gomel Regional Court and the Supreme Court to initiate such proceedings. On 9 July and 5 November 2008, the Chair of the Gomel Regional Court and the Chair of the Supreme Court, respectively, rejected his requests.

The complaint

3.1 The author claims that there has been a violation of his right of peaceful assembly, as guaranteed under article 21 of the Covenant. His rights were restricted on the ground that the activities of the Belarus Communist Party, of which he was a member, had been stayed for six months. The domestic courts should have established whether such a restriction was in conformity with the law. He argues that the national authorities, including the domestic courts, did not attempt to justify the restriction or provide arguments as to its necessity in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others.

3.2 The author maintains that the courts failed to assess the decision of the Executive Committee in the light of the provisions of the Covenant. Pursuant to articles 26 and 27 of the Vienna Convention on the Law of Treaties of 1969, Belarus is bound by the Covenant, should implement it in good faith and may not invoke the provisions of its internal law as justification for its failure to implement the Covenant. According to article 15 of the Belarusian Law on International Treaties, universally recognized principles of international law and provisions of international treaties in force in respect of Belarus form an integral part of domestic law. According to article 20 of the Universal Declaration of Human

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[1] According to the Gomel Regional Court's decision of 10 April 2008, "the author's intention to hold a picket on an invented problem (*надуманная проблема*) would lead to a breach of the rights of others to receive reliable information", as protected under article 34 of the Constitution. The Regional Court further indicates that the author's argument regarding the alleged unlawfulness of the decision to deny authorization is unsubstantiated, as article 10 of the Law on Mass Events does not contain an exhaustive list of grounds for denying authorization; and article 6 requires a range of circumstances to be considered, in particular those having bearing on the provision of public safety. The District Court complied with the requirements of the law. The Regional Court has taken note of the author's argument that he was acting in his own name rather than on behalf of any political party. The Regional Court has also taken note of the Supreme Court's decision of 2 August 2007, whereby the activities of the Belarus Communist Party were stayed for six months due to the party's failure to comply with the law and its own statute.

Rights, everyone has the right to freedom of peaceful assembly and association. The right of peaceful assembly is enshrined in article 21 of the Covenant and can only be restricted in respect of one of the legitimate aims contained therein. The author claims that, by restricting his right of peaceful assembly on a ground other than one of those specified in article 21 of the Covenant, the State party has failed to honour its international obligations.

State party's observations on admissibility

4.1 On 8 May 2009, the State party challenged the admissibility of the communication, arguing that the author had failed to exhaust all available domestic remedies and that there was no reason to believe that the application of those remedies would have been unavailable or ineffective. The author had not asked the Prosecutor's Office or the Chair of the Supreme Court to initiate supervisory review proceedings in accordance with article 439 of the Code of Civil Procedure. The State party submits that the author's statement that his requests for supervisory review were dismissed on 9 July and 5 November 2008 does not correspond to the facts.

4.2 Further, the State party submits that the author's allegation that supervisory review proceedings do not constitute an effective remedy is a subjective, personal opinion, which is also inconsistent with the facts. The State party refers to statistics according to which, in 2007, 733 administrative cases were examined by the Chair of the Supreme Court, a supervisory instance, which quashed or altered 179, including 63 submitted through the Prosecutor's Office. In 2008, the Chair of the Supreme Court examined 1,071 administrative cases and quashed or altered 317, including 146 submitted through the Prosecutor's Office. Thus, in 2007 and 2008 respectively, the Chair of the Supreme Court quashed or altered 24.4 per cent and 29.6 per cent of the administrative cases that were examined.

Author's comments on the State party's observations on admissibility

5.1 On 7 June 2009, the author reiterated that he had not requested the Prosecutor's Office to initiate supervisory review proceedings, as such a request would not lead to a re-examination of the case, the initiation of supervisory review proceedings being dependent on the discretionary power of a few public officials. In addition, making such a request involved payment of a fee. He notes that the Committee has previously established that in States parties where the initiation of supervisory review proceedings is dependent on the discretionary power of a few public officials, such the Prosecutor General or the Chair of the Supreme Court, the remedies to be exhausted are limited to a cassation appeal. The author reiterates that he requested the Chair of the Supreme Court to initiate a supervisory review. On 5 November 2008, a Deputy Chair of the Supreme Court replied to his request, a fact which has not been disputed by the State party.

5.2 The author further notes, with reference to the statistics provided by the State party, that those data relate to administrative cases and therefore have no bearing on his civil case, which is regulated by the provisions of the Code of Civil Procedure.

State party's observations on the merits

6.1 On 30 July 2009, the State party submitted its observations on the merits of the case. It reiterates the facts of the case and states that the District Court had established that the aim of the picket announced by the author was inconsistent with the circumstances, as no decision had been taken with a view to banning political parties, in particular the Belarus Communist Party. According to the preamble to the Law on Mass Events of 30 December 1997, "freedom of mass events not violating the legal order and rights of other citizens of the Republic of Belarus is guaranteed by the State". According to article 34 of the Constitution, "citizens shall be guaranteed the right to receive reliable information on the activities of State bodies and public associations". The author was denied authorization to hold the picket as it concerned an invented problem (*надуманная проблема*), thereby contravening the constitutional right of citizens to receive reliable information.

6.2 The State party further submits that the organization and conduct of mass events is governed by the Law on Mass Events of 30 December 1997. The law is aimed at creating the conditions for the realization of constitutional rights and freedoms of citizens and the protection of public order and public safety when such events are held in public spaces. According to the law, "freedom of mass activities not violating the legal order and rights of other citizens of the Republic of Belarus is guaranteed by the State".

6.3 The right of peaceful assembly is enshrined in article 21 of the Covenant. No restrictions can be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others. Belarus has ratified the Covenant and incorporated its provisions, including articles 19 and 21, into domestic law. In particular, the right to freedom of thought and belief and the right to freedom of expression are guaranteed under article 33 of the Constitution. Article 35 of the Constitution guarantees the right to hold assemblies, rallies, street processions, demonstrations and pickets, provided that they do not violate law and order or breach the rights of other citizens. In addition, under article 23 of the Constitution, no restrictions may be placed on the rights and freedoms of citizens other than those imposed in conformity with the law, in the interests of national security, public safety, the protection of public health or morals or the protection of the rights and freedoms of others.

Author's comments on the State party's observations on the merits

7.1 On 12 February 2010, the author challenged the State party's argument that authorization to hold a peaceful assembly had been denied to him in conformity with the law as the authorities considered that the picket in question concerned an invented problem. In this regard, he points out that the right protected under article 21 of the Covenant can be restricted only under the requirements listed therein. He claims that the national legislation on the organization and conduct of mass events does not contain the notion of "invented problem". The author states that the restriction of his right of peaceful assembly on such a ground is therefore neither in accordance with the law nor necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others.

7.2 The author adds that he has exhausted all available domestic remedies and that he is the victim of a violation of article 21 of the Covenant.

Issues and proceedings before the Committee

Consideration of admissibility

8.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

8.2 The Committee has ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

8.3 The Committee takes note of the State party's contention that the author could have requested the Prosecutor's Office, as well as the Chair of the Supreme Court, to initiate a supervisory review of the decisions of the District Court and the Regional Court, and of the

State party's reference to a number of administrative cases where supervisory review proceedings were successfully brought. It also takes note of the author's explanation that his requests to initiate supervisory review proceedings were unsuccessful, that such remedies were neither effective nor accessible, and that the data provided by the State party are irrelevant to the circumstances of his case. The Committee recalls its previous jurisprudence, according to which the State party's supervisory review procedures against court decisions which have entered into force do not constitute a remedy which has to be exhausted for purposes of article 5, paragraph 2 (b), of the Optional Protocol.[2] It also notes that the State party has not shown whether and, if so, in exactly how many cases, supervisory review procedures have been successfully brought in cases concerning the right of peaceful assembly. In the circumstances, the Committee considers that it is not precluded under article 5, paragraph 2 (b), of the Optional Protocol from examining the communication.

8.4 The Committee considers that the author has sufficiently substantiated his claim under article 21 of the Covenant for purposes of admissibility. Accordingly, it declares the communication admissible and proceeds to its examination on the merits.

Consideration of the merits

9.1 The Human Rights Committee has considered the communication in the light of all the information made available to it by the parties, as provided under article 5, paragraph 1, of the Optional Protocol.

9.2. The issue before the Committee is whether the denial of the required authorization to hold a picket as planned by the author constitutes a violation of his rights under article 21 of the Covenant.

9.3 The Committee recalls that the right of peaceful assembly, as guaranteed under article 21 of the Covenant, is a fundamental human right, which is essential for public expression of one's views and opinions and indispensable in a democratic society.[3] This right entails the opportunity to organize and participate in a peaceful assembly, including a stationary assembly in a public location (a picket). It recalls that no restrictions on this right are permissible unless they are (a) imposed in conformity with the law and (b) necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others.

9.4 The Committee notes that, given that the State party has established a procedure for organizing mass events but has denied the author's application for authorization of the planned picket, it has set a restriction on the exercise of the author's right of peaceful assembly. The issue before the Committee in the present case is therefore whether this restriction is justified under the criteria set out in the second sentence of article 21 of the Covenant. The Committee recalls that, if a State party imposes a restriction under article 21, it is up to that State party to demonstrate that the restriction in question was necessary for the aims set out in that provision.

9.5 The Committee takes note of the State party's argument that the author was denied authorization to hold a picket in relation to the alleged ban on political parties, which the local authorities considered to be an invented problem. It also notes the State party's explanation that no decision to ban political parties has been taken and that therefore the subject of the author's picket conflicted with the right of citizens to receive reliable information, as protected under article 34 of the Constitution and by the Law on Mass Events of 30 December 1997. The Committee also notes the State party's statement that the above-mentioned law is aimed at creating the conditions for the realization of citizens' constitutional rights and freedoms and for the protection of public safety and public order when such events are held in public spaces. It further notes the author's contention that the national legislation on mass events does not spell out the notion of "invented problem" as a ground for denying authorization to hold a mass event.

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[2] See, for example, communication No. 1785/2008, *Olechkevitch v. Belarus*, Views adopted on 18 March 2013, para. 7.3; communication No. 1784/2008, *Schumilin v. Belarus*, Views adopted on 23 July 2012, para. 8.3; communication No. 1841/2008, *P.L. v. Belarus*, Decision of inadmissibility 26 July 2011, para. 6.2.

[3] See, for example, communication No. 1948/2010, *Turchenyak and others v. Belarus*, Views adopted on 24 July 2013, para. 7.4.

9.6 The Committee is called upon to establish whether the restriction imposed on the exercise of the author's right of peaceful assembly amounts to a violation of article 21 of the Covenant. The Committee notes that authorization for the author's planned picket was denied by the decision of the Zhlobinsky District Executive Committee of the Gomel Region, which was upheld by the domestic courts.

9.7 The Committee recalls that the rejection of a person's right to organize a public assembly on the basis of its content is one of the most serious interferences with the freedom of peaceful assembly.[4] Furthermore, when a State party imposes restrictions with the aim of reconciling an individual's right and the aforementioned interests of general concern, it should be guided by the objective of facilitating that right, rather than seeking unnecessary or disproportionate limitations to it.[5] Any restriction on the exercise of the right of peaceful assembly must conform to the strict tests of necessity and proportionality.

9.8 In the present case, the Committee observes that the State party has failed to demonstrate that the denial of authorization to hold a picket, even if imposed in conformity with the law, was necessary for any of the legitimate purposes set out in article 21 of the Covenant. In particular, the State party has not specified why conducting the picket on the subject concerned would pose a threat to public safety and public order, as claimed by the State party. As to the alleged need to protect the rights of others to receive reliable information, the State party has not demonstrated how that was consistent with the legitimate purposes contained in article 21 of the Covenant and, in particular, why it was necessary in a democratic society, the cornerstone of which is free dissemination of information and ideas, including information and ideas contested by the Government or the majority of the population.[6] Furthermore, the State party has not shown that those purposes could only be achieved by the denial of the picket proposed by the author. The Committee concludes that in the absence of any other pertinent explanations from the State party, the facts as submitted reveal a violation, by the State party, of the author's rights under article 21 of the Covenant.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the State party has violated the author's right under article 21 of the Covenant.

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[4] Also see, for example, communication no. 1873/2009, *Alekseev v. the Russian Federation*, Views adopted on 25 October 2013, para. 9.6.

[5] See, for example, communication No. 1948/2010, *Turchenyak and others v. Belarus*, Views adopted on 24 July 2013, para. 7.4

[6] See, mutatis mutandis, communication No. 1274/2004, *Korneenko v. Belarus*, Views adopted on 31 October 2006, para. 7.3, which reads: "The reference to the notion of 'democratic society' in the context of article 22 indicates, in the Committee's opinion, that the existence and operation of associations, including those which peacefully promote ideas not necessarily favourably received by the government or the majority of the population, is a cornerstone of a democratic society."

11. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including adequate compensation. The State party is also under an obligation to take steps to prevent similar violations in the future.

12. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when it has been determined that a violation has occurred, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views and to have them widely disseminated in Belarusian and Russian in the State party.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Appendix

Individual opinion of Committee members Mr. Fabián Omar Salvioli and Mr. Victor Manuel Rodríguez-Rescia (concurring)

We agree with the Committee's decision in communication No. 1864/2009, *Kirsanov v. Belarus*, in which it held the State internationally responsible for a violation of article 21 of the International Covenant on Civil and Political Rights (on the right of peaceful assembly). However, we believe that the Committee should also have found a violation by the State of article 19 of the Covenant in this case. The facts show that the State's prohibition of a peaceful demonstration on the ground that there was "no reason" to hold the event constitutes a serious violation of the right to freedom of expression.

The purpose of the demonstration, as the author clearly stated, was to attract public attention to the State party's policy against opposition political parties and grass-roots movements and to protest against what was seen as an attempt by the State party to dismantle the Belarus Communist Party.[a] There is no doubt that in the present case the author's expression of his opinion was the most important consideration and peaceful assembly was the means chosen to exercise that right. The violation was therefore of both rights, but especially of the right to freedom of expression.

In the light of the facts, the Committee should simply apply the law, that is to say, the Covenant. The arguments put forward by the parties serve as a point of reference that the Committee may take into consideration when assessing the case, but they should not in any way curtail the Committee's authority to judge the case in the way it considers will best fulfil the object and purpose of the Covenant.

As long as the Committee persists in restricting its own capacity to respond, it will continue to adopt inconsistent decisions. At the same session at which these Views were adopted, the Committee reached a different conclusion in another case involving the same State party and similar events.[b]

As we have previously stated in individual opinions concerning other communications, the Committee sometimes applies articles of the Covenant that have not been invoked by the parties in their submissions.[c] On other occasions — such as this — it does not. There is no logic to this approach.

Putting an end to such inconsistencies would improve the Committee's practice, better implement the law, properly fulfil the object and purpose of the Covenant and give better guidance to States in providing due reparation in cases in which they are found to be internationally responsible.

[Done in English, French and Spanish, the Spanish text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

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[a] See the Committee's Views, para. 2.1.

[b] *Youbko v. Belarus*, communication No. 1903/2009. See in particular the Committee's considerations in paras. 9.2 to 9.6.

[c] *Sedhai v. Nepal*, communication No. 1865/2009, individual opinion of Committee members Mr. Fabián Salvioli and Mr. Victor Rodríguez-Rescia, para. 6. Footnote 3 of the joint opinion provides 10 examples of Views in which the Committee applied articles not invoked by the parties.

N. Communication No. 1865/2009, *Sedhai v. Nepal* (Views adopted on 19 July 2013, 108th session)*

Submitted by:	Shanta Sedhai (represented by counsel, Advocacy Forum–Nepal)
Alleged victims:	Mukunda Sedhai (author's husband) and family
State party:	Nepal
Date of communication:	3 October 2008 (initial submission)
Subject matter:	Enforced disappearance
Procedural issue:	Exhaustion of domestic remedies
Substantive issues:	Right to life, prohibition of torture and cruel and inhuman treatment, right to liberty and security of person, respect for the inherent dignity of the human person, recognition as a person before the law and right to an effective remedy
Articles of the Covenant:	Article 2 (para. 3); article 6 (para. 1); article 7; article 9; article 10 (para. 1) alone, and in conjunction with article 2 (para. (3))
Article of the Optional Protocol:	Article 5 (para. 2 (b))

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 19 July 2013,

Having concluded its consideration of communication No. 1865/2009, submitted to the Human Rights Committee by Shanta Sedhai under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Shanta Sedhai, the wife of Mukunda Sedhai, a Nepalese national born in December 1970 who disappeared on 19 December 2003. She

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* The following members of the Committee participated in the examination of the present communication: Mr. Yadh Ben Achour, Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Walter Kälin, Ms. Zonke Zanele Majodina, Mr. Kheshoe Parsad Matadeen, Ms. Iulia Antoanella Motoc, Mr. Gerald L. Neuman, Sir Nigel Rodley, Mr. Victor Manuel Rodríguez-Rescia, Mr. Fabián Omar Salvioli, Ms. Anja Seibert-Fohr, Mr. Yuval Shany, Mr. Konstantine Vardzelashvili and Ms. Margo Waterval.

The text of an individual opinion by Committee members Mr. Salvioli and Mr. Rodríguez-Rescia is appended to the present Views.

claims that Nepal has violated the rights of her missing husband and the rights of herself and her family under articles 6, 7, 9, and 10 (para. 1) read in conjunction with article 2 (para. 3) of the International Covenant on Civil and Political Rights.[1] She is represented by Advocacy Forum–Nepal.

The facts as submitted by the author

2.1 The author married Mr. Sedhai on 7 March 1991 and they resided together at Jeevanpur Village Development Committee, Ward No. 6, Dhading District. They have two children: a son, Anil Shedhai, born on 25 March 1993, and a daughter, Anita Shedhai, born on 22 September 1999. Mr. Sedhai was a businessman and frequently visited Kathmandu where he rented a room near Swayambu.

2.2 On 18 December 2003, Mr. Sedhai was in Kathmandu to conduct business and sell sugar-cane. The author had visited him in Kathmandu on 17 December. She left him on 18 December to take care of their two children, who were in the village. Mr. Sedhai spent the night of 18 December in his rented room in Swayambu. On the afternoon of 19 December 2003, he went to a tea shop in Bhimsensthan, Ward No. 20, in the centre of Kathmandu. The tea shop was managed by Raju Khakurel, who is a second cousin of Mr. Sedhai, and comes from Dhading, the same district as Mr. Sedhai. The shop was regularly used as a meeting place for those from Dhading District who stayed in Kathmandu, and Mr. Sedhai was known to others there.

2.3 Four or five men in plain clothes arrived at the tea shop and went down the corridor to the back room. Mr. Raju Khakurel and Mr. Narayan Silwal, who were in the shop and witnessed the detention of Mr. Sedhai, provided statements to Advocacy Forum–Nepal respectively on 6 and 8 August 2008. They both recall that some of the men were armed and remember that they themselves were asked to stand up and were searched. They were then asked if they had anything to confess. After they had all answered in the negative, one of the men in plain clothes called out Mr. Sedhai's name.

2.4 Mr. Sedhai stood up and presented himself to the men. He was then led out of the room by the men in plain clothes, who locked the door of the back room from the outside and told the other men that they would return in 15 minutes. When Mr. Sedhai was taken past Mr. Khakurel, the men in plain clothes ordered Mr. Kharkurel not to open the door to the room and said that they would return in 15 minutes. Mr. Sedhai was taken southwards away from the tea shop and Mr. Silwal, one of the witnesses who knew him from his home village reported that other customers who were present told him that they saw Mr. Sedhai being taken away in a white and green army van that had been parked down the hill.

2.5 After his arrest, Mr. Sedhai was detained in Chhauni Barracks. In 2005, the National Human Rights Commission conducted an investigation and concluded that Mr. Sedhai had been arrested and subsequently detained. A witness, Mr. Dev Bahadur Maharjan, who gave a statement on 6 August 2008 to Advocacy Forum–Nepal, clearly recollects spending time with him and discussing how he had been arrested and was treated in the Barracks. Mr. Sedhai told him that he had been beaten and tortured so badly during his first few weeks in detention that he could not stand up and had to be taken to hospital. After these discussions, Mr. Maharjan realized that the man he had heard a few weeks earlier being beaten and kicked for one and a half hours by army men was Mr. Sedhai. He had heard him state that he was Mukunda from Jeevanpur Village Development Committee, Dhading District. Mr. Maharjan also remembers that Mr. Sedhai had a wound on his face, which he told Mr. Maharjan was from being kicked.

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[1] The Optional Protocol entered into force for Nepal on 14 August 1991.

2.6 Two witness statements delivered in August 2008 to Advocacy Forum–Nepal by Mr. Maharjan and Mr. Om Parkash Timilsena describe the inhuman conditions, torture and inhuman and degrading treatment they suffered at Chhauni Barracks. According to these statements, detainees at the Barracks were kept blindfolded throughout their stay, were denied access to medicines and hygiene facilities, were denied food and water, and were able to wash and bathe only rarely. Severe torture and beatings, including electric shocks and severe beatings with bamboo sticks, were commonplace in the Barracks. Mr. Maharjan also testified that, in the room where he was kept, a man had died as a result of the injuries inflicted on him through torture.

2.7 On 25 January 2004, the day before the Festival of Education (Saraswati Puja) in Nepal, Mr. Sedhai was, according to Mr. Maharjan's testimony, taken out of the detention room with five other people. The whereabouts of all these people remains unknown. In his statement to Advocacy Forum–Nepal, Mr. Timilsena remembers that during the first week of February 2004, about nine people, including Mr. Sedhai, were transferred into the room in Chhauni Barracks where he was detained, and where interrogators used to keep photographs of Maoists and Maoist student leaders on the wall. Mr. Sedhai remained in this room for 15 to 20 days. He then told Mr. Timilsena that he was going to be released. The following day, he was taken with four or five other people from this room. There has been no reported sighting of him since then and the author has been unable to discover any further evidence as to his whereabouts.

2.8 A week after Mr. Sedhai's arrest, the author was visited by a man in plain clothes who stated that he was from the District Police Office in Hanumandhoka, Kathmandu, and said that the author's husband would be released if she paid bail. That same day, the Chief District Officer of Kathmandu District "disavowed" this person and said he would investigate whether Mr. Sedhai had been arrested by the police.

2.9 In the first six weeks after Mr. Sedhai's arrest, the author received two notes from him, brought to her by sympathetic guards from Chhauni Barracks. The first of these notes came about 10 to 15 days after his arrest, and the person who delivered it identified himself as a member of the army from Chhauni Barracks. The author lost this first letter but remembers that it said that Mr. Sedhai was fine and asked her to give the army guard "a nice jacket". On 16 January 2004, another member of the army delivered a second letter from Mr. Sedhai. As requested, she gave the army guard a jacket worth 350 rupees. This was the last letter the author received from her husband. After Mr. Sedhai was arrested on 19 December 2003, his family suffered from extreme economic hardship and personal anguish. The family's mental suffering and economic hardship continues to this day, as they are still anxious to know about his fate.

2.10 On 14 December 2004, the author filed a writ of habeas corpus with the Supreme Court of Nepal against the Ministry of Home Affairs, the Ministry of Defence, Chhauni Barracks, Police Headquarters, Kathmandu District Administration Office, Kathmandu District Police Office and Army Headquarters. Starting on 17 December 2004, these offices filed responses denying any knowledge of Mr. Sedhai's whereabouts. The writ was put on hold on 25 May 2005 after the author did not appear for a hearing before the court on 11 April 2005, because of a transport strike in her area that lasted several days. The author filed a second writ of habeas corpus on 15 September 2005. The officials responded by saying that they did not know the whereabouts of the alleged victim and demanding that the writ be dismissed. The Supreme Court put this second writ together with those of several others who had disappeared during the armed conflict.

2.11 In June 2007, the Supreme Court issued a decision concerning many people who had disappeared during the conflict, including Mr. Sedhai. In this seminal decision, the Supreme Court directed the legislature to criminalize enforced disappearance and investigate the numerous allegations of disappearances, including that of Mr. Sedhai.

date, the Government has taken no effective steps to implement this decision, and because the Supreme Court is the highest judicial body in Nepal, there is no other effective judicial process by which to attempt to appeal or enforce this decision.

2.12 The author also filed a complaint with the National Human Rights Commission on 26 March 2004. In its attempts to collect evidence regarding this complaint and determine the alleged victim's whereabouts, the Commission received no cooperation from government and army officials, including the Ministry of Defence and the Human Rights Cell of the Nepal Army Headquarters, despite repeated attempts to ascertain information. After more than two years of investigation, the Commission issued a decision on 6 June 2006, stating that it was convinced that army personnel had arrested Mr. Sedhai on 19 December 2003. The decision recommended that the Government make Mr. Sedhai's whereabouts public, prosecute the army personnel responsible for his disappearance, and provide information to the Supreme Court and the Commission regarding the punishment of the officials responsible for his disappearance. The National Human Rights Commission has proven to have little power to enforce its decisions as they come in the form of recommendations rather than mandatory orders, unlike those of the Supreme Court.

2.13 According to the author, although there is a reference to enforced disappearance in the Interim Constitution, enforced disappearance is not defined as a crime in Nepal. This means that she cannot, on her own initiative, compel the police to investigate her husband's disappearance.

The complaint

3.1 The author claims a violation of article 6, as the State party failed to take specific and effective measures to prevent the disappearance of Mr. Sedhai. It has not acted with due diligence to investigate his whereabouts or bring those responsible to justice since his disappearance was reported to the authorities, despite recommendations by the National Human Rights Commission and directives from the Supreme Court to do so.

3.2 The author claims a violation of article 7 for:

(a) Keeping Mr. Sedhai in incommunicado detention at Chhauni Barracks in Kathmandu from the date of his arrest on 19 December 2003 to his subsequent disappearance;

(b) Exposing him to ill-treatment and torture in Chhauni Barracks;

(c) Subjecting him to severe beatings;

(d) Subjecting his family to mental distress and anguish caused by the uncertainty concerning his fate; and

(e) Providing no effective avenue by which his family can obtain compensation for the mental distress and anguish they suffered as a result of the uncertainty surrounding his fate and whereabouts.

3.3 In the alternative, it is argued that the above circumstances also amount to a breach of article 10 of the Covenant. In addition, the author claims a violation of article 10 for denying Mr. Sedhai visits from his family as well as for the poor detention conditions. Mr. Sedhai was kept blindfolded, only allowed to wash infrequently, denied medicine for wounds, denied food and water, and not supplied with hygiene facilities.

3.4 The author claims a violation of article 9 for:

(a) Making an arrest that was not in accordance with national requirements and procedures;

(b) Keeping Mr. Sedhai in incommunicado detention;

(c) Failing to allow him to challenge the legality of his detention; and

(d) Failing to provide compensation for his arbitrary arrest and detention.

3.5 The author also claims violations of articles 6, 7, 9 and 10 read in conjunction with article 2 (para. 3), and article 2 (para. 3) read alone, because of the inadequacy of the measures taken to prevent, thoroughly investigate, and provide effective and enforceable remedies in the case of disappearances. In particular, it is submitted that:

(a) The powers of the Supreme Court of Nepal to determine the legality of detention and issue writs of habeas corpus are inadequate and thus the ability to challenge the legality of detention is ineffective;

(b) The failure of the State to maintain proper and accurate records of detainees prevented the author from obtaining sufficient information on the probable place of Mr. Sedhai's detention in order to effectively exercise the remedy of habeas corpus;

(c) The author's lack of access to an effective remedy has been compounded by defects in the law of perjury, as reported by the Working Group on Enforced or Involuntary Disappearances in December 2004;[2]

(d) The National Human Rights Commission can only make recommendations and has no power to enforce them. Despite the fact that it made a recommendation in this case and informed the Supreme Court and the Office of the Prime Minister and Council of Ministers, no investigation or prosecutions have taken place; and

(e) There is no law criminalizing enforced or involuntary disappearances or providing preventive measures, investigation mechanisms or compensation to alleged victims.

3.6 The author claims a violation of article 2 (para. 3) on its own, owing to the failure to provide an effective and enforceable remedy for the arbitrary arrest, torture and disappearance of her husband. Investigations into Mr. Sedhai's disappearance, with the exception of that conducted by the National Human Rights Commission, were not thorough, impartial or effective. The Commission mechanism was not effective and the legal remedy of habeas corpus was undermined by the State's delays, failure to keep proper detention records, and lack of political will to implement the relevant Supreme Court decision. On all these grounds, it is submitted that the State of Nepal has failed to provide an effective remedy to Mr. Sedhai and the author and has breached article 2 (para. 3) on its own and together with articles 6 (para. 1), 7, 9 and 10.

State party's observations on admissibility and on the merits

4.1 In a note verbale dated 9 August 2010, the State party submitted its observations. The State party recalls that the events described in the communication occurred during the armed conflict. To address this situation, the State party decided to establish a commission to investigate cases of disappearances, and a Truth and Reconciliation Commission, in compliance with article 33 (s) of the 2007 Interim Constitution of Nepal and clause 5.2.5 of the Comprehensive Peace Agreement of 21 November 2006. To this end, the Truth and Reconciliation Commission Bill and the Enforced Disappearance (Crime and Punishment) Bill, prepared in close consultation with all stakeholders, have been submitted to Parliament and are under active consideration by the relevant legislative committees. The two commissions to be formed after endorsement of these bills will investigate incidents that occurred during the conflict and bring to light the truth about cases of disappearance, including that of Mr. Sedhai. All individuals who have been affected by the conflict, including the author, will have an opportunity to present their cases and express their views before the commissions.

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[2] Report of the Working Group on Enforced or Involuntary Disappearances: Mission to Nepal, 6–14 December 2004 (E/CN.4/2005/65/Add.1), para. 42.

4.2 The activities of the two commissions will in no way be a substitute for the application of the existing criminal law. The Enforced Disappearance Bill has been designed to establish enforced disappearance as a crime punishable by law; to allow for the establishment of the truth by investigating incidents that took place during the armed conflict; to end impunity by paving the way for taking appropriate action against the perpetrators; and to provide appropriate compensation and justice to victims. Likewise, the Truth and Reconciliation Commission Bill states that the individuals involved in enforced disappearances shall not be granted amnesty under any circumstances. Appropriate action is to be taken in conformity with the law against individuals who are found guilty after a comprehensive inquiry and investigation has been carried out by the two commissions that will be set up once the bills have been approved.

4.3 As stated in the author's communication, after due investigation, the National Human Rights Commission has recommended that the Government of Nepal make known the whereabouts of Mr. Sedhai. It has also recommended that the officials responsible for the alleged acts of extrajudicial detention and enforced disappearances be prosecuted once their involvement in those acts has been established. Likewise, the Supreme Court has issued a directive requiring the Government to formulate appropriate legislation and conduct the necessary inquiries and investigations into cases of disappearances through the commissions created on the basis of that legislation. The submission of the two bills to Parliament fully demonstrates the firm and sincere commitment of the Government of Nepal to fully honour the National Human Rights Commission recommendation and the Supreme Court directive in this process.

4.4 The family of Mr. Sedhai received 100,000 rupees,[3] provided under the Government policy and commitment to offer monetary assistance as interim relief to the families of persons who died or disappeared during the armed conflict. This amount is only an interim measure; it can in no way compensate for the pain and anguish suffered by the family and relatives of Mr. Sedhai. The Government is committed to providing additional relief on the basis of the recommendations made by the transitional justice mechanisms that will be established in the near future.

4.5 The State party further expresses concern about the authenticity of the communication presented by Ms. Mandira Sharma of Advocacy Forum–Nepal, said to be representing the author. The State party considers it troubling that Ms. Shedai's signature on the letter of authorization dated 4 August 2008 is different from the one she executed on the first writ of habeas corpus submitted to the Supreme Court. Moreover, Ms. Shedai merely made a thumbprint on her second writ of habeas corpus.

4.6 On the grounds that the State party is committed to conducting appropriate and comprehensive inquiries into all cases of enforced disappearances that took place during the 10-year armed conflict and that it has already taken steps to provide an appropriate domestic remedy in the spirit of the Interim Constitution, the Comprehensive Peace Agreement and Supreme Court directives, the State party is of the view that the communication submitted by the author should be dismissed.

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[3] 100,000 Nepalese rupees are equivalent to about US$ 1,150 or €880 (24 April 2013).

Author's comments on the State party's submission

5.1 On 5 October 2010, the author rejected the State party's observations. The author contends that there is no certainty that the bills will be passed, when they will be passed or how they will affect victims' rights. The author therefore rejects the State party's argument that the commission to investigate cases of disappearances and the Truth and Reconciliation Commission constitute "prompt, independent and effective investigation and prosecution", as required under international human rights law.[4]

5.2 The author highlights the fact that more than seven years have passed since Mr. Sedhai was arrested and disappeared and the State party has failed to conduct an impartial investigation. Additionally, the two commissions mentioned do not yet exist and the timeline for their establishment remains vague. The Government has therefore not provided a satisfactory commitment to "promptly" initiate an investigation. The author recalls that the commissions are not judicial bodies and it has not been established that they will have the power to impose appropriate punishments for human rights offenders.

5.3 The author indicates that the State party has still not implemented the decision issued by the National Human Rights Commission on 6 June 2006, recommending that the Government of Nepal make public the whereabouts of Mr. Sedhai, prosecute the army personnel responsible for his disappearance, and provide information to the Supreme Court and the Commission on the punishment handed down to the officials responsible.

5.4 The author further considers that the commission to investigate cases of disappearances and the Truth and Reconciliation Commission are not judicial bodies and that the bills providing for their establishment would not give them the power to impose appropriate punishment for the perpetrators of Mr. Sedhai's enforced disappearance.

5.5 The author also considers that the State party's argument that transitional justice mechanisms are more appropriate for a comprehensive inquiry and investigation does not provide her with a guarantee of prompt prosecution of the perpetrators. Even if the Nepalese criminal justice system does not criminalize torture, enforced disappearance, incommunicado detention and ill-treatment, it remains the more appropriate avenue for immediate criminal investigation and punishment. The claim presented by the author cannot be dismissed on the basis of transitional justice bodies that have yet to be established.

5.6 As for the other grounds invoked in the State party's observations, the author considers that the sum of 100,000 rupees provided by the State party as interim relief following the Supreme Court decision of June 2007 does not constitute adequate compensation for her and her family.

5.7 With regard to the authenticity of the complaint, the author indicates that the discrepancies between her signatures on documents related to the complaint can be explained by the fact that she is semi-literate. Additionally, at the time of the first writ of habeas corpus to the Supreme Court on 14 December 2004, under pressure of time and out of fear, and given that there was no ink with which to make a thumbprint, the author asked her niece to sign on her behalf. On 15 September 2005, when filing a second writ of habeas corpus, the author made a thumbprint. On 3 August 2008, when authorizing Advocacy Forum-Nepal to file a communication, she was feeling confident and was able to sign. The author further highlights that the thumbprint she made at the end of the writ of habeas corpus submitted in September 2005 matches the one on the statement attached to her submission to the Human Rights Committee dated 8 October 2010, and that the signature on her letter of 3 August 2008 to the Human Rights Committee is the same as the one in that submission.

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[4] The author refers to the Committee's jurisprudence in communication No. 1469/2006, *Sharma v. Nepal*, Views adopted on 28 October 2008.

State party's additional observations

6.1 In a note verbale dated 3 February 2011 responding to the author's comments, the State party reiterated that the creation of the Truth and Reconciliation Commission and the commission on disappearances is mandated by the 2007 Interim Constitution of Nepal, as well as the 2006 Comprehensive Peace Agreement.[5] There is no reason to cast doubt on the constitutional provision aimed at addressing the issues of disappeared persons and human rights violations committed during the armed conflict. The provisions of chapter 8 of the Interim Constitution have to be observed in order for the bills to be approved by Parliament. The bills are under consideration and the commissions are going to be set up. There is no justification for questioning the mandates of the commissions that will be formed as they are clearly manifested in the relevant provisions of the Interim Constitution and the Comprehensive Peace Agreement.

6.2 The National Human Rights Commission was established as a constitutional body under article 132 of the Interim Constitution. It has the duty to ensure the respect, protection and promotion of human rights and their effective implementation. Its functions include receiving petitions or complaints of human rights violations, conducting independent inquiries and investigations and recommending action against perpetrators. The effective implementation of these recommendations is a constitutional obligation which the Government is committed to fulfilling. The author makes reference to an alleged failure by the Government to act on the recommendation of the National Human Rights Commission in the case of Mr. Sedhai. However, setting up a separate commission for a single incident would not be appropriate or practical. Additionally, as the facts in question occurred during the armed conflict, they must be addressed by the Truth and Reconciliation Commission, in conformity with international practice on establishing the truth in such cases, facilitating prosecution and reconciliation in society, and seeking a lasting peace. Once the bills become law, due action will be taken in accordance with the provisions contained therein.

6.3 The Government reiterates that the 100,000 rupees provided to the family of Mr. Sedhai is interim relief and that an additional relief package will be provided on the basis of the recommendations made by the transitional justice mechanisms to be set up in the near future.

6.4 As for the author's observation that the proposed commissions are not judicial bodies, the Government highlights the fact that they will be established under the constitutional mandate and the Comprehensive Peace Agreement. The commission on disappearances will also be created in accordance with the Supreme Court directive. These commissions should facilitate the smooth management of conflict, including by investigating grave human rights violations committed during the conflict and recommending the level of relief to be provided to the families of those who disappeared.

6.5 With regard to the comment that torture is not defined as a criminal offence, the 1990 Constitution states that no person in detention would be subjected to physical or mental torture or be given any cruel, inhuman or degrading treatment and any person so treated would be compensated in a manner determined by law. The 2007 Interim

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[5] On 14 March, 2013, Nepal's President Ram Baran Yadav passed an ordinance creating a Truth and Reconciliation Commission. On 1 April 2013, the Supreme Court suspended the application of the ordinance pending further review, mainly on the grounds that the mandate of the Commission included the possibility of amnesty for perpetrators of human rights violations.

Constitution states that such acts are punishable by law and that victims will be compensated as determined by law. The 1996 Torture-related Compensation Act includes a legal remedy and an ongoing law reform aims "to make the legal provisions against torture more effective".

6.6 The author has mentioned that she asked her niece to sign on her behalf. The provisions of the *Muluki Ain* (General Code), 2020 *Bikram Samvat*, prohibit anyone from signing for another person, even with the consent of the other person, and punish this practice. It is not stated in the writ of habeas corpus that the signature was entered by the niece and the author did not mention that she had any specific difficulty that prevented her from signing. The State party also indicates that the claim that there was no ink is false.

6.7 The State party therefore considers that the case has no merit and that the claim made by the author should be dismissed.

Issues and proceedings before the Committee

Consideration of admissibility

7.1 Before considering any claim contained in a communication, the Human Rights Committee must decide, in accordance with rule 93 of its rules of procedure, whether the communication is admissible under the Optional Protocol to the Covenant.

7.2 As required under article 5, paragraph 2 (a), of the Optional Protocol, the Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement.

7.3 With respect to the requirement of exhaustion of domestic remedies, the Committee notes that although the author filed a writ of habeas corpus with the Supreme Court in December 2004, and again in September 2005, which brought her allegations to the attention of the Ministry of Home Affairs, the Ministry of Defence, Chhauni Barracks, Police Headquarters, Kathmandu District Administration Office, Kathmandu District Police Office and Army Headquarters, no investigation of these allegations had been undertaken by the State party eight years after the violations were brought to its attention. The Committee notes that the reply received by the author after the second writ of habeas corpus reiterated that the government authorities did not know the whereabouts of the alleged victim and demanded the writ be dismissed, without providing any information on steps taken to investigate the case. The Committee also notes that the State party did not collaborate with the National Human Rights Commission, despite repeated attempts by the Commission to obtain information. Additionally, the State party has not taken any concrete action to investigate the whereabouts of Mr. Sedhai or to bring those responsible to justice since his disappearance was reported to the authorities, despite the recommendations of the Commission and directives from the Supreme Court to do so.

7.4 The Committee notes that the State party has provided no concrete information about ongoing criminal proceedings in the present case, and that, on the contrary, all the steps the author's family has taken to ascertain whether an investigation was being carried out point towards the absence of any such investigation or any significant progress in this regard. From the information available to it, the Committee can therefore not conclude that a criminal investigation is currently being carried out by the competent police or prosecution authorities.

7.5 The Committee further notes the State party's argument that the case of Mukhunda Sedhai will be addressed in the transitional justice framework which has still to be established in conformity with the 2007 Interim Constitution and with the 2006 Comprehensive Peace Agreement. It also notes the author's position that there is no certainty that the relevant bills will pass into law and no clarity as to their consequences for victims.[6] The Committee considers that under the present circumstances, the author has exhausted all available domestic remedies and that article 5, paragraph 2 (b), of the Optional Protocol does not preclude it from considering the communication.

7.6 Regarding the argument of the State party that the variations in the author's signature in the documents she presented throughout the process cast doubt on the authenticity of the complaint, the Committee considers that, taking into account the author's explanations, such variations are not sufficient to doubt the authenticity of the communication submitted to the Committee.

7.7 The Committee therefore considers that the communication is admissible and proceeds to the examination of the author's allegations under articles 6 (para. 1), 7, 9 and 10 read alone and in conjunction with article 2 (para. 3) of the Covenant, and article 2 (para. 3) read alone.

Consideration of the merits

8.1 The Human Rights Committee has considered the communication in the light of all the information made available to it by the parties, as provided for under article 5, paragraph 1, of the Optional Protocol.

8.2 The Committee notes that, according to the author, her husband, Mr. Mukunda Sedhai, was arrested on 19 December 2003 in a tea shop in Bhimsensthan, Kathmandu, by four or five men in plain clothes, some of whom were armed. The Committee takes note that Mr. Sedhai was known in the tea stall, where he regularly met other individuals from Dhading District who were staying in Kathmandu. The Committee also notes that the National Human Rights Commission conducted an investigation in 2005 and concluded that Mr. Sedhai had been arrested and subsequently detained in Chhauni Barracks; this information was subsequently confirmed by a witness, Mr. Dev Bahadur Maharjan. Although Mr. Sedhai's family still hopes to find him alive, the Committee understands the author's and her family's fear, in view of his prolonged disappearance, that he may be deceased. The Committee notes that the State party has produced no evidence refuting that possibility. The Committee recalls that, in cases of enforced disappearance, the deprivation of liberty followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate of the disappeared person places him or her outside the protection of the law and places his or her life at serious and constant risk, for which the State is accountable. In the case at hand, the Committee notes that the State party has produced no evidence to indicate that it has fulfilled its obligation to protect Mr. Sedhai's life. Therefore the Committee concludes that the State party has failed in its duty to protect Mr. Sedhai's life, in violation of article 6, paragraph 1, of the Covenant.[7]

8.3 The Committee recognizes the degree of suffering involved in being held indefinitely without contact with the outside world. It recalls its general comment No. 20 on article 7, which recommends that States parties should make provision to ban incommunicado detention.[8] The Committee notes that Mr. Sedhai was arrested on 19 December 2003, and that his whereabouts have not been known since 16 January 2004, when a member of the army delivered the second and last letter written by Mr. Sedhai to his wife since his detention. The Committee further notes that witness statements indicate that Mr. Sedhai was seriously beaten and tortured while detained in the Chhauni Barracks and highlight that the detention conditions were inhuman and that torture and beatings were commonplace there (see paras. 2.5 and 2.6 above). The Committee recalls that it is implicit in article 4, paragraph 2, of the Optional Protocol that the State party has a duty to investigate in good faith all allegations of violations of the Covenant made against it and its representatives and to furnish to the Committee the information available to it. In the absence of any convincing explanations from the State party, due weight must be given to the author's allegations.[9] On the basis of the information at its disposal, and recalling that article 7 allows no limitation, even in situations of public emergency,[10] the Committee finds that the acts of torture to which the author was exposed, his incommunicado detention and enforced disappearance, as well as his conditions of detention, reveal singular and cumulative violations of article 7 of the Covenant with respect to Mr. Sedhai.[11]

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[6] See footnote 5.

[7] See, inter alia, communication No. 1913/2009, *Abushaala v. Libya*, Views adopted on 18 March 2013, para. 6.2; communication No. 1753/2008, *Guezout and Rakik v. Algeria*, Views adopted on 19 July 2012, para. 8.4; communication No. 1779/2008, *Mezine v. Algeria*, Views adopted on 25 October 2012, para. 8.4; communication No. 1905/2009, *Ouaghlissi v. Algeria*, Views adopted on 26 March 2012, para. 7.4; and communication No. 1781/2008, *Djebrouni v. Algeria*, Views adopted on 31 October 2011, para. 8.4.

[8] See the Committee's general comment No. 20 (1992) on article 7, para. 11.

8.4 The Committee also takes note of the anguish and distress caused by Mr. Sedhai's disappearance to the author and their two children, Anil and Anita Shedhai. The family never obtained official confirmation of his detention. The Committee is therefore of the opinion that the facts before it also reveal a violation of article 7 of the Covenant, read alone and in conjunction with article 2, paragraph 3, with regard to the author's wife and their two children.[12]

8.5 With regard to the alleged violation of article 9, the Committee notes the author's statement (see paras. 2.1 to 2.3 above) that Mr. Sedhai was arrested on 19 December 2003 by four or five men in plain clothes, without a warrant and without being informed of the reasons for his arrest; that Mr. Sedhai was not informed of the criminal charges against him and was not brought before a judge or other judicial authority, which would have enabled him to challenge the legality of his detention; and that no official information was given to the author and her family regarding Mr. Sedhai's whereabouts or his fate. In the absence of satisfactory explanations from the State party, the Committee finds a violation of article 9 with respect to Mr. Sedhai.[13]

8.6 Regarding the complaint under article 10, paragraph 1, the Committee reiterates that persons deprived of their liberty may not be subjected to any hardship or constraint other than that resulting from the deprivation of liberty and that they must be treated with humanity and respect for their dignity. In view of Mr. Sedhai's incommunicado detention, the information provided by witnesses with regard to the detention conditions in Chhauni

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[9] See communication No. 1295/2004, *El Alwani v. Libyan Arab Jamahiriya*, Views adopted on 11 July 2007, para. 6.5; communication No. 1422/2005, *El Hassy v. Libyan Arab Jamahiriya*, Views adopted on 24 October 2007, para. 6.2; and communication No. 458/1991, *Mukong v. Cameroon*, Views adopted on 21 July 1994, para. 5.1.

[10] See article 4 of the Covenant.

[11] See communication No. 1761/2008, *Giri v. Nepal*, Views adopted on 24 March 2011, para. 7.4; *Ouaghlissi v. Algeria* (note 7 above), para. 7.5; *Djebrouni v. Algeria* (note 7 above), para. 8.5; *El Alwani v. Libyan Arab Jamahiriya* (note 9 above), para. 6.5.

[12] See *Abushaala v. Libya* (note 7 above), para. 6.4; *Mezine v. Algeria* (note 7 above), para. 8.6; communication No. 1640/2007, *El Abani v. Libyan Arab Jamahiriya*, Views adopted on 26 July 2010, para. 7.5.

[13] See *Mezine v. Algeria* (note 7 above), para. 8.7; *Ouaghlissi v. Algeria* (note 7 above), para. 7.7; and *Djebrouni v. Algeria* (note 7 above), para. 8.7.

Barracks, and in the absence of information provided by the State party in that regard, the Committee finds a violation of article 10, paragraph 1, of the Covenant.[14]

8.7 The author also invokes article 2, paragraph 3, of the Covenant, under which States parties are required to ensure that individuals have accessible, effective and enforceable remedies for asserting the rights recognized in the Covenant. The Committee attaches importance to the establishment by States parties of appropriate judicial and administrative mechanisms for addressing claims of rights violations. It refers to its general comment No. 31 (2004), which indicates that the failure by a State party to investigate allegations of violations could in itself give rise to a separate breach of the Covenant (para. 15). In the current case, although Mr. Sedhai's family repeatedly contacted the competent authorities regarding his disappearance, including judicial authorities such as the Police Headquarters, the District Police and the Supreme Court of Nepal, all their efforts led to nothing, and the State party failed to conduct a thorough and effective investigation into Mr. Sedhai's disappearance. Furthermore, the reference by the State party to procedures that have still not been implemented (the Truth and Reconciliation Commission and the commission on disappearances as mandated by the 2007 Interim Constitution of Nepal and the 2006 Comprehensive Peace Agreement) is not sufficient to consider that the author has had access to an effective remedy. Additionally, the announcement by the State party that the 100,000 rupees received by the family of Mr. Sedhai as interim relief will be complemented by a relief package that should be determined on the basis of the recommendations made by the same transitional justice mechanisms that are still pending implementation does not guarantee the author an effective remedy either. The Committee therefore concludes that the facts before it reveal a violation of article 2, paragraph 3, read in conjunction with article 6, paragraph 1, article 7, article 9, and article 10, paragraph 1, with regard to Mr. Sedhai and article 2, paragraph 3, read in conjunction with article 7 of the Covenant with respect to the author and their two children, Anil and Anita Shedhai.

9. The Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the information before it discloses violations by the State party of article 6, paragraph 1; article 7; article 9; article 10, paragraph 1; and article 2, paragraph 3, read in conjunction with article 6, paragraph 1; article 7; article 9; article 10, paragraph 1, of the Covenant with regard to Mr. Sedhai, and of article 7, read alone and in conjunction with article 2, paragraph 3, with respect to the author and their two children.

10. In accordance with article 2, paragraph 3, of the Covenant, the State party is under an obligation to provide the author and his family with an effective remedy, including by: (a) conducting a thorough and effective investigation into Mr. Sedhai's disappearance; (b) providing the author and her family with detailed information about the results of its investigation; (c) releasing him immediately if he is still being detained incommunicado; (d) in the event that Mr. Sedhai is deceased, handing over his remains to his family; (e) prosecuting, trying and punishing those responsible for the violations committed; and (f) providing adequate compensation to the author and her children for the violations suffered and to Mr. Sedhai, if he is still alive. The State party is also under an obligation to take steps to prevent similar violations in the future.

11. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether or not there has

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[14] See the Committee's general comment No. 21 (1992) on article 10, para. 3; *Mezine v. Algeria* (note 7 above), para. 8.8; communication No. 1780/2008, *Zarzi v. Algeria*, Views adopted on 22 March 2011, para. 7.8; and communication No. 1134/2002, *Gorji-Dinka v. Cameroon*, Views adopted on 17 March 2005, para. 5.2.

been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure for all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when a violation has been established, the Committee wishes to receive from the State party, within 180 days, information concerning the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views and disseminate them broadly in the official languages of the State party.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Appendix

Individual opinion of Committee members Mr. Fabián Omar Salvioli and Mr. Victor Manuel Rodríguez-Rescia

1. We agree with the decision of the Human Rights Committee in communication No. 1865/2009, which established the international responsibility of the State for the violation of articles 6 (para. 1), 7, 9 and 10 (para. 1), and article 2 (para. 3), read in conjunction with articles 6 (para. 1), 7, 9 and 10 (para. 1), of the Covenant, with respect to Mukunda Sedhai, and article 7, read separately and in conjunction with article 2 (para. 3), with respect to the author and her two children.

2. However, we deeply regret that the Committee did not find a violation of article 16 of the Covenant, departing from its established jurisprudence on enforced disappearances.

3. In the present case, the Committee did not find a violation of article 16 of the Covenant on the grounds that it had not been invoked by the author of the communication; the Committee thereby failed to apply the legal principle of *iura novit curia* and unjustifiably restricted its own competence in a way that is inappropriate for an international body that protects human rights.

4. The enforced disappearance of the victim was established in the file submitted to the Committee; the Committee has maintained a clear position since the adoption of its Views in the case of *Kimouche v. Algeria*,[a] whereby the enforced disappearance of persons implies the violation of the right to recognition as a person before the law. In this regard, it pointed out that "the Committee reiterates its settled jurisprudence, according to which the intentional removal of a person from the protection of the law for a prolonged period of time may constitute a refusal to recognize that person as a person before the law if the victim was in the hands of the State authorities when last seen and if the efforts of his or her relatives to obtain access to potentially effective remedies, including judicial remedies […], have been systematically impeded".[b]

5. It is difficult to understand why, in the light of similar established facts, the Committee draws different conclusions according to the legal arguments put forward by the parties. In adopting this course of action, the Committee addresses the issues before it as if the cases were governed by civil law rather than international human rights law. The reluctance of the majority of the Committee to apply the principle of *iura novit curia* leads to unreasonable results in the light of the established facts before it.

6. It should be noted that this alleged practice is not only based on a misconception but is also applied inconsistently: the Human Rights Committee has itself on occasion applied the principle of *iura novit curia*, although it has not mentioned it explicitly in its Views. In recent years, there have been various examples of the Committee's correct application of the provisions of the Covenant, on the basis of the evidence, departing from the legal arguments or the specific articles cited by the parties.[c]

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[a] See communication No. 1328/2004, *Kimouche v. Algeria*, Views adopted on 10 July 2007, para. 7.9.

[b] See communication No. 1781/2008, *Berzig v. Algeria*, Views adopted on 31 October 2011, para. 8.9.

[c] See communication No. 1390/2005, *Koreba v. Belarus*, Views adopted on 25 October 2010; communication No. 1225/2003, *Eshonov v. Uzbekistan*, Views adopted on 22 July 2010, para. 8.3; communication No. 1206/2003, *R.M. and S.I. v. Uzbekistan*, Views adopted on 10 March 2010, paras. 6.3 and 9.2, with a finding of no violation; communication No. 1520/2006, *Mwamba v. Zambia*, Views adopted on 10 March 2010; communication No. 1320/2004, *Pimentel et al. v. Philippines*,

7. The Committee should set clear guidelines in the future for the assessment of the facts of the cases submitted to it, in order to apply the law; follow the best and most coherent international approach, without restricting its own competence; apply without hesitation the principle of *iura novit curia* when it is relevant; and avoid inconsistencies in its jurisprudence – all with a view to adequately fulfilling its mandate to monitor respect for and the guarantee of the rights set forth in the International Covenant on Civil and Political Rights for persons under the jurisdiction of a State party to the Optional Protocol, under the individual communications procedure.

[Done in English, French and Spanish, the Spanish text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Views adopted on 19 March 2007, paras. 3 and 8.3; communication No. 1177/2003, *Ilombe and Shandwe v. Democratic Republic of the Congo*, Views adopted on 17 March 2006, paras. 5.5, 6.5 and 9.1; communication No. 973/2001, *Khalilova v. Tajikistan*, Views adopted on 30 March 2005, para. 3.7; and communication No. 1044/2002, *Shukurova v. Tajikistan*, Views adopted on 17 March 2006, para. 3.

O. Communication No. 1873/2009, *Alekseev v. Russian Federation* (Views adopted on 25 October 2013, 109th session)*

Submitted by:	Nikolai Alekseev (not represented by counsel)
Alleged victims:	The author
State party:	Russian Federation
Date of communication:	25 March 2009 (initial submission)
Subject matter:	Right to peaceful assembly
Procedural issue:	Same matter already being examined under another procedure of international investigation or settlement; exhaustion of domestic remedies; level of substantiation of claims
Substantive issues:	Unjustified restrictions to the right of peaceful assembly
Articles of the Covenant:	21
Article of the Optional Protocol:	2; 5, paragraphs 2 (a) and (b)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 25 October 2013,

Having concluded its consideration of communication No. 1873/2009, submitted to the Human Rights Committee by Nikolai Alekseev under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Nikolai Alekseev, a Russian national born in 1977. He claims to be a victim of violation by the Russian Federation of his rights under article 21 of the International Covenant on Civil and Political Rights.[1] The author is not represented by counsel.

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* The following Committee members participated in the examination of the present communication: Mr. Yadh Ben Achour, Mr. Lazhari Bouzid, Mr. Ahmad Amin Fathalla, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Walter Kälin, Ms. Zonke Zanele Majodina, Mr. Kheshoe Parsad Matadeen, Mr. Gerald L. Neuman, Sir Nigel Rodley, Mr. Victor Manuel Rodríguez-Rescia, Mr. Fabián Omar Salvioli, Ms. Anja Seibert-Fohr, Mr. Yuval Shany, Mr. Konstantine Vardzelashvili and Ms. Margo Waterval.

[1] The Optional Protocol entered into force for the State party on 1 January 1992.

The facts as submitted by the author

2.1 The author is a homosexual and a human rights activist. From 2006 to 2008, the author, together with other activists, tried to organize a number of peaceful assemblies (gay pride marches) in Moscow, which were all banned by the municipal authorities.

2.2 On 11 July 2008, the author, together with two other activists, submitted a request to the Prefect of the Central Administrative District of Moscow to hold a stationary meeting — a picket —, in front of the Iranian Embassy in Moscow. The purpose of the gathering was to express concern over the execution of homosexuals and minors in the Islamic Republic of Iran and to call for a ban on such executions. The author informed the authorities of the purpose, date, time and place of the event, which was scheduled to take place from 1 p.m. to 2 p.m. on 19 July 2008 in front of the Iranian Embassy, and which would involve no more than 30 participants.

2.3 On the same date, the Deputy Prefect of the Central Administrative District of Moscow refused to authorize the event, considering that the aim of the picket would trigger "a negative reaction in society" and could lead to "group violations of public order which can be dangerous to its participants".

2.4 On 16 July 2008, the author filed a complaint against this refusal with the Tagansky District Court of Moscow. He argued that Russian law does not permit a blanket ban on conducting a peaceful assembly, as long as the purpose of the assembly is in conformity with constitutional values. He added that if the Prefecture had any serious grounds to believe that the proposed picket would trigger mass riots, they should have arranged sufficient police protection for participants of the assembly in order to secure the exercise of their constitutional right to peaceful assembly.

2.5 On 18 September 2008, the Tagansky District Court rejected the complaint and endorsed the municipal authority's argument that it was impossible to ensure security of the participants of the event and avoid riots, as the proposed event would provoke strong public reaction. In the court's opinion, the decision of 11 July 2008 was in conformity with both national law and the provisions of the European Convention on Human Right and Fundamental Freedoms. On 5 October 2008, the author appealed the judgement before the Moscow City Court on cassation proceedings, but his appeal was rejected on 18 December 2008.

The complaint

3. The author claims that the State party violated his right to peaceful assembly as protected by article 21 of the Covenant, as it imposed a blanket prohibition on the meeting that he had intended to organize. The authorities' refusal was not imposed "in conformity with the law" nor was it "necessary in a democratic society". In particular, national law clearly requires that the authorities take the necessary measures to ensure the security of the participants in an assembly and to secure its peaceful conduct. Moreover, the restriction imposed was not "necessary in a democratic society" and did not pursue any of the legitimate aims mentioned in article 21 of the Covenant. The authorities' refusal to propose an alternative location for the mass event in question and their assertion that they could not provide sufficient police force to protect the participants, demonstrate that the authorities' real aim was to prevent the gay and lesbian minority in Russia from becoming visible to the public and from attracting public attention to their concerns. Finally, the fact that a minority group's ideas might "offend, shock or disturb" the majority and might provoke violent opposition cannot justify a blanket ban on the expression of views of such groups by means of peaceful assembly. On the contrary, the State party must protect peaceful assemblies of minority groups against violent acts.

State party's observations on admissibility and merits

4.1 On 29 June 2009, the State party submitted its observations on admissibility and merits. It recalls the facts of the case, and the proceedings engaged by the author. It further notes that the author's claims under article 21 of the Covenant are unfounded as the author was refused permission to hold the picket in order to ensure public order. In this connection, the State party notes that article 21 of the Covenant recognizes the right to peaceful assembly, but also provides for restriction to that right in conformity with the law in the interests of national security or public safety, public order, the protection of public health or morals or the protection of rights and freedoms of others. Articles 31 and 55 of the Constitution of the Russian Federation guarantee the right to peaceful assembly with similar restrictions to those set out in article 21 of the Covenant, and which are developed in the Federal Law on Rallies, Meetings, Demonstrations, Marches and Picketing (Federal Law on Mass Events). According to article 8, paragraph 1, of the Federal Law on Mass Events, public mass events may be held at any place suitable for the purposes of the event provided that such event does not endanger the security of persons participating in the event in question. The State party further notes that on 18 September 2008, the Tagansky District Court of Moscow concluded that in light of the negative public reaction towards such pickets, the authorities would not have been able to fully ensure the security of persons participating in such a mass event. The State party maintains that the authorities' refusal of 11 July 2008 was in line with the international norms and domestic legislation.

4.2 The State party adds that the author has not exhausted all domestic remedies as required by article 5, paragraph 2 (b), of the Optional Protocol to the Covenant, as according to articles 367, 376, 377 and chapter 41 of the Civil Procedure Code, the author could have sought a supervisory review of the decisions of the national courts from the Presidium of the Moscow City Court and thereafter, the Supreme Court.

Author's comments on the State party's observations

5.1 On 9 November 2009, the author notes that the State party has erroneously referred to article 8 of the Federal Law on Mass Events. According to him, this provision guarantees the right to hold a public event at any place suitable for its purposes. However, the restrictions on holding public events are linked to the security considerations at a particular place due to its characteristics, such as risk of collapse of a building, for example. Nothing in the wording of this article suggests that its aim is to provide for general restrictions on the right of peaceful assembly due to security considerations, as invoked by the State party. Furthermore, the article referred to should, in any event, be interpreted in the context of "ensuring realization of the constitutionally mandated right of the citizens of the Russian Federation to peaceful assembly […], to hold rallies, meetings, demonstrations, marches and picketing" as stated in the preamble of the Federal Law on Mass Events.

5.2 The author submits that if the authorities invoke security considerations as a reason for refusing the holding of a mass event at a place or route proposed by the organizer, they are obligated, under article 12 of the Federal Law on Mass Events, to suggest an alternative place for the event. A different interpretation — such as placing the burden of identifying an alternative location on the organizers — would lead to the conclusion that the law in question lacks sufficient clarity and, therefore the restrictions on the right of freedom of assembly would not be regarded as being applied "in conformity with the law" for purposes of article 21 of the Covenant. According to the author, it is up to the authorities to suggest an alternative place for a mass event if they have concerns regarding the security of the participants.

5.3 As to the State party's comment regarding the exhaustion of domestic remedies, the author points out that the supervisory review proceedings do not constitute an effective remedy, as they do not ensure re-examination of the merits of the case under appeal by a panel of judges (the Presidium of the Moscow City Court or the Supreme Court). According to article 381 of the Civil Procedure Code, such an appeal is considered by a judge of the supervisory review court, who can reject it even without examining the case file materials. It is only if the judge finds the presented arguments convincing that he or she may request the case file and, at his or her discretion, remit the case to the panel of judges of the supervisory review court for consideration. In this regard, the author refers to a similar case in 2007, where the complainant had appealed the refusal to hold a rally for the purpose of calling for tolerance towards sexual minorities under a supervisory review, but a judge of the Supreme Court had concluded that the refusal was lawful as it was not possible to ensure the participants' safety, and decided not to grant a supervisory review of the case. As his case concerned similar circumstances, the author submits that appealing through the supervisory review process would have been futile and ineffective.

5.4 The author also requests the Committee to take into account the jurisprudence of the European Court of Human Rights regarding the ineffectiveness of supervisory review proceedings, due to the fact that the grounds for quashing the final judgements of lower courts are not clear in the Civil Procedure Code, and the procedure is not directly accessible to complainants. In addition, he notes the Committee's concerns, after consideration of the sixth periodic report of the Russian Federation under the Covenant, as to systematic discrimination against individuals on the basis of their sexual orientation in the State party, including prejudices by public officials (CCPR/C/RUS/CO/6 and Corr.1, para. 27).

5.5 On 2 December 2009, the author submitted additional information. In particular, the author draws attention to the judgement of the European Court of Human Rights in the case *Martynets v. Russia*, in which the European Court assessed the effectiveness of the supervisory review proceedings in force in the State party since 7 January 2008. It concluded that the supervisory review proceedings in the State party could not be considered a domestic remedy that had to be exhausted under article 35 of the European Convention on Human Rights before lodging an application before the Court, since the supervisory review proceedings in respect of legally binding judgements could be conducted through multiple instances, with the ensuing risk that the case could go back and forth from one instance to another for an indefinite period.[2]

State party's further observations

6.1 On 29 September 2010, the State party reiterates the facts of the case and the actions which the author undertook at the domestic level. It further reiterates that the author's claim under article 21 of the Covenant is unfounded and that similar restrictions on the enjoyment of the right to peaceful assembly, as set out in that article, are also provided for in article 55 of the Constitution and in article 8 of the Federal Law on Mass Events. It recalls that article 8 of the Federal Law on Mass Events stipulates that a public event may be held at any place suitable for the purpose of the event provided that the holding of the event does not endanger the security of the participants. In this connection, the State party maintains that the decision of the Deputy Prefect of the Central Administrative District of Moscow was based on the consideration of the above-mentioned security aspect.

6.2 It also reiterates that the author has failed to exhaust available domestic remedies within the supervisory review proceedings, therefore the present communication is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol to the Covenant.

6.3 The State party adds that the author has abused the right to submit a communication, as the same matter is being examined by another procedure of international investigation or settlement. In particular, it draws attention to the fact that on 29 January 2007, 14 February 2008 and 10 March 2009, the author submitted applications to the European Court of Human Rights regarding the authorities' refusal to allow him to hold a mass event (gay pride march) and picket concerning the rights of sexual minorities.[3] In this connection, it submits that the complaints before the European Court and the present communication are similar in nature as they have been submitted by the same person concerning the rights of the same group of persons (belonging to sexual minorities) and the actions of the same municipal authority.

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[2] European Court of Human Rights, *Martynets v. Russia*, application No. 29612/09, decision of 5 November 2009 as to admissibility.

Author's further comments

7.1 On 1 November 2010, the author informed the Committee that on 21 October 2010 the European Court of Human Rights had adopted a judgement in his case,[4] concerning the authorities' refusal to allow him hold events similar to the ones mentioned in the present communication in 2006, 2007 and 2008. In that particular case, the European Court found a violation of the author's rights under article 11 of the European Convention on Human Rights (right to peaceful assembly).

7.2 On 30 November 2010, the author reiterated that the supervisory review proceedings could not be considered as an effective remedy for the purposes of admissibility. As to the State party's argument that the present communication should be viewed as an abuse of the right to complain because a similar matter was being examined by another international procedure, the author submits that the present complaint is based on and concerns different facts. The applications before the European Court of Human Rights concerned prohibitions to hold pride marches or pickets proposed by the author as alternatives to a pride march, while the present complaint concerns the prohibition to hold a picket protesting the execution of homosexuals and minors in the Islamic Republic of Iran. Therefore, the author considers that the present communication should be declared admissible under article 5 of the Optional Protocol to the Covenant.

Issues and proceedings before the Committee

Consideration of admissibility

8.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the case is admissible under the Optional Protocol to the Covenant.

8.2 As required under article 5, paragraph 2 (a), of the Optional Protocol, the Committee shall ascertain whether the same matter is being examined under another procedure of international investigation or settlement. In this regard, the Committee notes the State party's argument that on 29 January 2007, 14 February 2008 and 10 March 2009, the author submitted applications to the European Court of Human Rights regarding the State authorities' refusal to allow the author to hold mass events and a picket concerning the rights of sexual minorities and that they were registered by the European Court. The State party submits that the complaints before the European Court and the present communication are of a similar nature as they have been submitted by the same person, concern the rights of the same group of persons (belonging to sexual minorities) and concern the actions of the same authorities. The Committee further notes the author's explanation that the applications before the European Court of Human Rights concerned different factual circumstances, namely the prohibition to hold pride marches or pickets proposed by the author as an alternative to a pride march, in the years 2006 to 2008, while the present complaint concerns the prohibition to hold a picket protesting the execution of homosexuals and minors in the Islamic Republic of Iran.

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[3] The applications are registered with the European Court of Human Rights under Nos. 4916/07; 25924/08 and 14500/09.

[4] See European Court of Human Rights, *Alekseev v. Russia*, applications Nos. 4916/07; 25924/08 and 14500/09.

8.3 The Committee recalls that the concept of "the same matter" within the meaning of article 5, paragraph (a), of the Optional Protocol is understood as including the same authors, the same facts and the same substantive rights.[5] The Committee notes that it is clear from the available information on the case file that the author's applications to the European Court of Human Rights concern the same person and relate to the same substantive rights as those invoked in the present communication. However, the Committee observes that the respective applications before the European Court do not relate to the same facts, that is, the particular event referred to in the present communication. Consequently, the Committee considers that it is not precluded by article 5, paragraph 2 (a), of the Optional Protocol from examining the present communication for purposes of admissibility.

8.4 With regard to the requirement laid down in article 5, paragraph 2 (b), of the Optional Protocol, the Committee takes note of the State party's argument that the author failed to exhaust available domestic remedies within the supervisory review proceedings, therefore the communication is inadmissible. In this respect, the Committee notes that the author appealed to the Moscow City Court, which upheld the lower court's decision. The Committee refers to its case law, according to which supervisory review proceedings against court decisions which have entered into force constitute an extraordinary remedy, dependent on the discretionary power of a judge or prosecutor,[6] and which do not need to be exhausted for purposes of admissibility. In the absence of any other pertinent information on file, the Committee considers that it is not precluded by article 5, paragraph 2 (b), of the Optional Protocol, from examining the present communication.[7]

8.5 The Committee considers that the author has sufficiently substantiated, for purposes of admissibility, his claim under article 21 of the Covenant. It declares the communication admissible and proceeds to its examination on the merits.

Consideration of the merits

9.1 The Human Rights Committee has considered the present communication in the light of all the information received, in accordance with article 5, paragraph 1, of the Optional Protocol.

9.2 The first issue before the Committee is whether the State party's authorities' restriction of the author's right to peaceful assembly was permissible under any of the criteria contained in article 21 of the Covenant.

9.3 The Committee recalls that the right of peaceful assembly, as guaranteed under article 21 of the Covenant, is essential for the public expression of a person's views and opinions, and indispensable in a democratic society.[8] It also recalls that States parties must put in place effective measures to protect against attacks aimed at silencing those exercising their right to freedom of expression by means of an assembly.[9] A restriction of the right of peaceful assembly is permissible only if it is (a) in conformity with the law, and (b) necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others.

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[5] See for example, communication No. 1002/2001, *Wallmann et al. v. Austria*, Views adopted on 1 April 2004, para. 8.4.

[6] See, inter alia, communications No. 836/1998, *Gelazauskas v. Lithuania*, Views adopted on 17 March 2003, and No. 1537/2006, *Gerashchenko v. Belarus*, decision of inadmissibility adopted on 23 October 2009.

[7] See for example, communication No. 1866/2009, *Chebotareva v. the Russian Federation*, Views adopted on 26 March 2012, para. 8.3.

9.4 In the present case, the Committee observes that both the State party and the author agree that the denial of permission to hold a picket from 1 p.m. to 2 p.m. on 19 July 2008 in front of the Iranian Embassy in Moscow was an interference with the author's right of assembly, but the parties disagree as to whether it was a permissible restriction.

9.5 The Committee also notes that the State party defends the denial of permission to hold the picket concerned as necessary in the interest of public safety. Although the author contends that the safety rationale was a pretext for denying the permit, the Committee finds it unnecessary to evaluate this factual allegation, because the author's claim under article 21 can be decided on the assumption that the challenged restriction was motivated by concern for public safety.

9.6 The Committee notes that permission for the author's proposed picket was denied on the sole ground that the subject it addressed, namely, advocacy of respect for the human rights of persons belonging to sexual minorities, would provoke a negative reaction that could lead to violations of public order. The denial had nothing to do with the chosen location, date, time, duration or manner of the proposed public assembly. Thus the decision of the Deputy Prefect of the Central Administrative District of Moscow of 11 July 2008 amounted to a rejection of the author's right to organize a public assembly addressing the chosen subject, which is one of the most serious interferences with the freedom of peaceful assembly. The Committee notes that freedom of assembly protects demonstrations promoting ideas that may be regarded as annoying or offensive by others and that, in such cases, States parties have a duty to protect the participants in such a demonstration in the exercise of their rights against violence by others. It also notes that an unspecified and general risk of a violent counterdemonstration or the mere possibility that the authorities would be unable to prevent or neutralize such violence is not sufficient to ban a demonstration. The State party has not provided the Committee with any information in the present case to support the claim that a "negative reaction" to the author's proposed picket by members of the public would involve violence or that the police would be unable to prevent such violence if they properly performed their duty. In such circumstances, the obligation of the State party was to protect the author in the exercise of his rights under the Covenant and not to contribute to suppressing those rights. The Committee therefore concludes that the restriction on the author's rights was not necessary in a democratic society in the interest of public safety, and violated article 21 of the Covenant.

9.7 In light of this conclusion, the Committee decides not to examine the author's additional claim that the denial of permission was not in conformity with the law on the grounds that the national law referred only to safety concerns such as the risk of collapse of a building, and that it obliged the authorities to designate an alternative location for the assembly when they rejected the original application.

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[8] See communication No. 1948/2010, *Turchenyak et al v. Belarus*, Views adopted on 24 July 2013, para. 7.4.

[9] See the Committee's general comment No. 34 (2011) on freedoms of opinion and expression, para. 23, *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 40*, vol. I (A/66/40 (Vol. I)), annex V. The Committee notes that although general comment No. 34 refers to article 19 of the Covenant, it also provides guidance with regard to elements of article 21. See communication No. 1790/2008, *Govsha et al. v. Belarus*, Views adopted 27 July 2012, para. 9.4.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of the author's right under article 21 of the Covenant.

11. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including adequate compensation and reimbursement of any legal costs paid by him. The State party is also under an obligation to take steps to prevent similar violations in the future.

12. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when a violation has been established, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views and to have them widely disseminated in the official language of the State party.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

P. Communication No. 1874/2009, *Mihoubi v. Algeria* (Views adopted on 18 October 2013, 109th session)[*]

Submitted by:	Rabiha Mihoubi, represented by Track Impunity Always (TRIAL)
Alleged victims:	Nour-Eddine Mihoubi (the author's son) and the author herself
State party:	Algeria
Date of communication:	4 March 2009 (initial submission)
Subject matter:	Enforced disappearance
Procedural issue:	Exhaustion of domestic remedies
Substantive issues:	Right to life, prohibition of torture and cruel and inhuman treatment, right to liberty and security of person, respect for the inherent dignity of the human person, right to recognition as a person before the law and right to an effective remedy
Articles of the Covenant:	2 (para. 3), 6, 7, 9 (paras. 1 to 4), 10 and 16
Article of the Optional Protocol:	5 (para. 2 (b))

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 18 October 2013,

Having concluded its consideration of communication No. 1874/2009 submitted to the Human Rights Committee by Rabiha Mihoubi under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The author of the communication, which is dated 4 March 2009, is Rabiha Mihoubi, an Algerian citizen born on 13 March 1933. She claims that her son Nour-Eddine Mihoubi, an Algerian national born on 15 March 1962, is a victim of violations by Algeria of articles 2 (para. 3), 6, 7, 9, 10 and 16 of the Covenant. She also claims that she herself is a victim of a violation of articles 2 (para. 3) and 7 of the Covenant. The author is represented by Track Impunity Always (TRIAL).

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[*] The following members of the Committee took part in the consideration of this communication: Mr. Yadh Ben Achour, Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Walter Kälin, Ms. Zonke Zanele Majodina, Mr. Kheshoe Parsad Matadeen, Mr. Gerald L. Neuman, Sir Nigel Rodley, Mr. Victor Manuel Rodriguez-Rescia, Mr. Fabián Omar Salvioli, Ms. Anja Seibert-Fohr, Mr. Yuval Shany, Mr. Konstantine Vardzelashvili and Ms. Margo Waterval.

Pursuant to rule 90 of the Committee's rules of procedure, Committee member Mr. Lazhari Bouzid did not take part in the consideration of the present communication.

The text of the two individual opinions by Mr. Salvioli and Mr. Rodriguez-Rescia and by Mr. Neuman are appended to the present Views.

1.2 On 4 June 2009, the Committee, through its Special Rapporteur on new communications and interim measures, decided not to consider the admissibility and the merits of the case separately.

The facts as submitted by the author

2.1 At 4 p.m. on 27 January 1993, Nour-Eddine Mihoubi and his brother Hocine Mihoubi were arrested by local police officers at the latter's home in Diss (Bou Saâda). Hocine Mihoubi was released the following day. He immediately informed the author, who travelled to Bou Saâda without delay. She tried in vain to obtain information from the police but the officers claimed to know nothing about Nour-Eddine Mihoubi's arrest.

2.2 Nour-Eddine Mihoubi was initially held at the Bou Saâda police station. He was detained there for 11 days before being transferred to the police of the *wilaya* of Algiers. According to information that his family received in 1995 through former fellow inmates, he was then taken to the Châteauneuf detention centre, where he was allegedly held incommunicado for 18 months. The same sources claim that he was subjected to torture during his detention in Châteauneuf and that his health seriously deteriorated as a result. Thereafter his family was unable to ascertain his whereabouts and failed either to establish contact with him or to obtain any news about him from the Algerian authorities.

2.3 The author filed a complaint about her son's abduction with the public prosecutor in Bou Saâda. It was in connection with this complaint that, three and a half years after the disappearance of Nour-Eddine Mihoubi, on 22 July 1996, the assistant prosecutor of Bou Saâda expressly acknowledged that the Bou Saâda local police had indeed arrested Nour-Eddine Mihoubi and that he had been transferred to the custody of the police of the *wilaya* of Algiers on 7 February 1993. However, the investigations carried out at the request of the public prosecutor failed to come up with any indication as to where Nour-Eddine Mihoubi might be, what might have happened to him when he was in the custody of the security services, or why he had been arrested.

2.4 Nour-Eddine Mihoubi's father, Mohamed Mihoubi, also contacted the public prosecutor of Algiers to inform him of his son's abduction. In addition, he wrote to a number of national authorities who were in a position to provide assistance, including the President of the Republic and the Minister of Justice. On 21 October 1995, with no word from the authorities concerned, Mohamed Mihoubi again petitioned the public prosecutor of Algiers, the Minister of Justice and the President of the Republic, but these petitions also met with no response.

2.5 The Mihoubi family subsequently submitted a request to trace the victim to the National Human Rights Observatory (ONDH). The only response the family received was a letter dated 12 May 1996 in which they were informed that Nour-Eddine Mihoubi was wanted under prosecutor's arrest warrant No. 25/93 and investigating judge's arrest warrant No. 143/93, issued by the Special Court on 31 March 1993, that is, two months after his arrest.

2.6 On 16 January 2000, the local police of Bourouba sent an unsubstantiated summons to the author, asking her to present herself the following day at the headquarters of the Inspectorate-General of the Directorate-General of National Security in Algiers. It subsequently transpired that the intention was to take a statement from her, as the mother of the disappeared person, about her son's abduction and disappearance. The members of the family were never contacted again for the purpose of the inquiry and never received any indication that any form of investigation was actually under way.

2.7 When the National Advisory Commission for the Promotion and Protection of Human Rights was established to replace the National Human Rights Observatory, Nour-Eddine Mihoubi's family also petitioned this institution. The family's complaint was registered on 28 September 2002. This petition also failed to shed any light on the fate of the missing person.

2.8 Nour-Eddine Mihoubi's case was also referred to the Working Group on Enforced or Involuntary Disappearances, which asked the Government of Algeria to initiate a search for the victim. To date, however, the State party has failed to act upon this request or to shed any light on Nour-Eddine Mihoubi's case.

2.9 On 9 March 2006, the family began the process of obtaining an official declaration of death pursuant to Ordinance No. 06-01 of 27 February 2006 implementing the Charter for Peace and National Reconciliation, and the national gendarmerie of Bourouba in Algiers issued a certificate of disappearance for Nour-Eddine Mihoubi on 12 April 2007.

The complaint

3.1 The author maintains that her son was a victim of enforced disappearance, in violation of articles 2 (para. 3), 6 (para. 1), 7, 9 (paras. 1–4), 10 (para. 1) and 16 of the Covenant. The author also maintains that she herself is a victim of a violation of article 7, read alone and in conjunction with article 2 (para. 3), of the Covenant.

3.2 Nour-Eddine Mihoubi's arrest by agents of the State party was followed by a refusal to acknowledge his deprivation of liberty and the concealment of his fate. His prolonged absence and the circumstances and context of his arrest suggest that he died in custody. Invoking the Committee's general comment No. 6 (1982) on article 6, the author claims that incommunicado detention is highly likely to result in a violation of the right to life, since victims are at the mercy of their jailers who, by the very nature of the circumstances, are subject to no oversight. Even in the event that disappearance does not lead to the worst, the threat to the person's life at the time constitutes a violation of article 6, insofar as the State has failed in its duty to protect the fundamental right to life. That was compounded by the fact that no effort was made to conduct an investigation into Nour-Eddine Mihoubi's fate. The author therefore considers that the State party has violated article 6, read alone and in conjunction with article 2, paragraph 3, of the Covenant.

3.3 Referring to the Committee's jurisprudence, the author maintains that the mere fact of subjection to enforced disappearance constitutes inhuman or degrading treatment. Consequently, the anguish and suffering caused by Nour-Eddine Mihoubi's indefinite detention and complete lack of contact with his family or the outside world amount to treatment which is contrary to article 7 of the Covenant. In addition, Nour-Eddine Mihoubi is likely to have been subjected to torture in the Châteauneuf detention centre. All detainees who survived this centre have claimed to have been tortured, to have witnessed sessions of torture inflicted upon their fellow inmates and to have experienced a truly horrific ordeal. It therefore seems more than likely that Nour-Eddine Mihoubi, who was held there for over a year, suffered the same fate. Moreover, several prisoners who came into contact with him in the detention centre have informed his family that he suffered extreme abuse at the hands of his jailers that has to be classified as torture. They added that his health seriously deteriorated as a result of this abuse. The author also considers that her son's disappearance constituted and continues to constitute for herself and the rest of her family a paralysing, painful and distressing ordeal given that they know nothing of his fate or, if he is in fact dead, of the circumstances of his death and where he is buried. In view of the Committee's jurisprudence on the issue,[1] the author concludes that the State party has also violated her rights under article 7, read alone and in conjunction with article 2, paragraph 3, of the Covenant.

3.4 The author notes that the authorities approached by the Mihoubi family denied holding the victim. It was not until July 1996 that the public prosecutor finally acknowledged Nour-Eddine Mihoubi's arrest and detention, albeit without providing his relatives with any information about his whereabouts or his fate. The family learned that he had been transferred to Châteauneuf detention centre through an unofficial, indirect source. Accordingly, the author submits that the State party has acted in violation of article 9, paragraph 1, of the Covenant, since Nour-Eddine Mihoubi was arrested on 27 January 1993 without a warrant and without being informed of the reasons for his arrest. No member of his family has seen him or been able to communicate with him since the release of his brother. He was not at any time informed of the criminal charges against him, in violation of article 9, paragraph 2. Moreover, he was not brought before a judge or other judicial authority, either at the start of the lawful period of police custody or when it ended. The document issued by the assistant prosecutor of the court of Bou Saâda does not mention that Nour-Eddine Mihoubi was brought before the prosecutor before being transferred to the custody of Algiers police, even though he had spent 11 days in police custody. In any event, recalling that incommunicado detention per se may constitute a violation of article 9, paragraph 3, the author concludes that this provision was violated in her son's case. In conclusion, as Nour-Eddine Mihoubi has been denied the protection of the law during the entire period of his indefinite detention, he has never been able to institute proceedings to contest the lawfulness of his detention or seek his release through the courts, in violation of article 9, paragraph 4, of the Covenant.

3.5 The author also maintains that, given his incommunicado detention, her son was not treated with humanity and with respect for the inherent dignity of the human person, in violation of article 10, paragraph 1, of the Covenant.

3.6 The author also claims that, as a victim of enforced disappearance, Nour-Eddine Mihoubi was denied the protection of the law, in violation of article 16 of the Covenant.

3.7 The author maintains that, since all the steps she took to ascertain her son's fate were fruitless, the State party did not fulfil its obligation to guarantee Nour-Eddine Mihoubi an effective remedy, since it should have conducted a thorough and effective investigation into his disappearance and should have kept the family informed of the results of its investigations. The absence of an effective remedy is compounded by the fact that a total and general amnesty was declared following the promulgation on 27 February 2006 of Ordinance No. 06-01 implementing the Charter for Peace and National Reconciliation, which prohibits, on pain of imprisonment, the pursuit of legal remedies to shed light on the most serious crimes, such as enforced disappearances, guaranteeing impunity to the individuals responsible for violations. This amnesty law is in breach of the State's obligation to investigate serious violations of human rights and of victims' right to an effective remedy. The author concludes that the State party has violated article 2, paragraph 3, of the Covenant with regard to herself and her son.

3.8 As to the exhaustion of domestic remedies, the author stresses that all her efforts and those of her family have been to no avail. The family repeatedly petitioned any institution that was in a position to help them, including the National Human Rights Observatory (which subsequently became the National Advisory Commission for the Promotion and Protection of Human Rights), the Minister of Justice and the President of the Republic.

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[1] Communication No. 959/2000, *Bazarov v. Uzbekistan*, Views adopted on 14 July 2006, para. 8.5.

None of those institutions responded to their petitions, in spite of the judicial authorities' acknowledgement, in July 1996, that Nour-Eddine Mihoubi had indeed been arrested and detained by the Bou Saâda local police. Nour-Eddine Mihoubi's family has at all times acted with diligence, the author having duly responded to the summons addressed to her. However, the investigations have never managed to shed light on the fate of Nour-Eddine Mihoubi. The conclusions sent to his family are not only incomplete but also incongruous, since, according to the letter from the Observatory dated 12 May 1996, an arrest warrant had supposedly been issued for Nour-Eddine Mihoubi when at the time he had already been in the security forces' custody for two months. It must therefore be concluded, in the light of the foregoing, that all the appeals made by Nour-Eddine Mihoubi's family were futile and ineffective in that they were unable to give them satisfaction.

3.9 In addition, the author submits that she no longer has the legal right to take judicial proceedings since the promulgation of Ordinance No. 06-01 implementing the Charter for Peace and National Reconciliation. Not only did all the remedies sought by the author prove futile and ineffective, they are now also totally unavailable.

State party's observations

4.1 On 29 May 2009, the State party contested the admissibility of the communication in a "background memorandum on the inadmissibility of communications submitted to the Human Rights Committee in connection with the implementation of the Charter for Peace and National Reconciliation". The State party is of the view that communications incriminating public officials, or persons acting on behalf of public authorities, in enforced disappearances during the period in question, that is, from 1993 to 1998, should be considered in the context of the sociopolitical and security conditions that prevailed in the country during a period when the Government was struggling to combat terrorism.

4.2 During that period the Government was obliged to combat groups that were not formally organized. Consequently, there was some confusion in the manner in which a number of operations were carried out among the civilian population, and it was difficult for civilians to distinguish between the actions of terrorist groups and those of the security forces. There are numerous explanations for cases of enforced disappearance but, according to the State party, they cannot be blamed on the Government. Data documented by many independent sources indicate that the concept of disappearance in Algeria during the period in question covers six distinct scenarios, none of which can be blamed on the Government. The first scenario concerns persons reported missing by their relatives who had gone underground of their own accord in order to join an armed group and had asked their families to claim that they had been arrested by the security services as a way of "covering their tracks" and avoiding "harassment" by the police. The second scenario concerns persons who were reported missing after their arrest by the security services but used this situation as an opportunity to go underground upon their release. The third scenario concerns missing persons who had been abducted by armed groups but who, because their abductors were either not identified or had used uniforms or identification documents unlawfully obtained from police officers or soldiers, were incorrectly identified as being members of the armed forces or security services. The fourth scenario concerns persons who had actually taken the decision to leave their homes and in some cases also the country because of personal problems or family disputes. The fifth scenario concerns persons reported missing by their families who were actually wanted terrorists who had been killed and buried in the maquis following clashes between rival armed groups. Finally, the sixth scenario concerns persons reported missing who were in fact living in Algeria or abroad under false identities created via a vast network of document forgers.

4.3 The State party stresses that it was in view of the diversity and complexity of the situations covered by the concept of disappearance that the Algerian legislature, following the referendum on the Charter for Peace and National Reconciliation, recommended a comprehensive approach to the issue of the disappeared under which the cases of all persons who had disappeared during the "national tragedy" would be considered, all victims would be offered support to help them to overcome the ordeal and all victims of disappearance and their beneficiaries would be entitled to redress. According to statistics prepared by the Ministry of the Interior, 8,023 disappearances have been reported and 6,774 cases have been considered, of which 5,704 have been approved for compensation, 934 have been rejected and 136 are pending a decision. A total of 371,459,390 Algerian dinars has been paid out in compensation to all the victims concerned. In addition, a total of 1,320,824,683 Algerian dinars has been paid out in monthly pensions.

4.4 The State party further argues that not all domestic remedies have been exhausted. The State party observes that, as may be seen from the author's statements, she has sent letters to political and administrative authorities, petitioned advisory and mediation bodies and submitted requests for assistance to representatives of the prosecution service but has not actually initiated legal proceedings and seen them through to their conclusion by availing herself of all available remedies of appeal and cassation. Of all these authorities, only the representatives of the prosecution service are authorized by law to open a preliminary inquiry and refer a case to the investigating judge. Under the Algerian legal system, it is the public prosecutors who receive complaints and institute criminal proceedings where these are warranted. However, in order to protect the rights of victims and their beneficiaries, the Code of Criminal Procedure authorizes the latter to sue for damages by filing a complaint with the investigating judge. In this case, it is the victim, not the prosecutor, who initiates criminal proceedings by bringing the matter before the investigating judge. This remedy, which is provided for in articles 72 and 73 of the Code of Criminal Procedure, has not been used, despite the fact that it would have enabled the victims to institute criminal proceedings and force the investigating judge to initiate an investigation, even if the prosecution service had decided otherwise.

4.5 The State party also notes the author's contention that the adoption by referendum of the Charter for Peace and National Reconciliation and its implementing legislation — in particular article 45 of Ordinance No. 06-01 — makes it impossible to maintain that there exist effective and available domestic remedies in Algeria to which the families of victims of disappearance might have recourse. On this basis, the authors believed they were under no obligation to bring the matter before the relevant courts, thereby prejudging the courts' position and findings in respect of the application of the Ordinance. However, the authors cannot invoke this Ordinance and its implementing legislation as a pretext for failing to institute the legal proceedings available to them. The State party recalls the Committee's jurisprudence to the effect that a person's subjective belief in, or presumption of, the futility of a remedy does not exempt that person from the requirement to exhaust all domestic remedies.[2]

4.6 The State party then turns its attention to the nature, principles and content of the Charter for Peace and National Reconciliation and its implementing legislation. It stresses that, in accordance with the principle of the inalienability of peace, which has become an international right to peace, the Committee should support and consolidate peace and encourage national reconciliation so that States affected by internal crises can rebuild. The State party adopted the Charter as part of this national reconciliation effort, and its implementing Ordinance establishes legal measures for the discontinuance of criminal proceedings and the commutation or remission of sentences for any person who is found guilty of acts of terrorism or who benefits from the provisions of the legislation on civil dissent, except for persons who have committed or been accomplices in mass killings, rapes or bombings in public places. The Ordinance also prescribes measures to help address the issue of disappearances by introducing a procedure for filing a judicial declaration of death, which entitles beneficiaries to receive compensation as victims of the "national tragedy". Social and economic measures have also been put in place, including the provision of assistance with finding a job or compensation for all persons considered victims of the "national tragedy". Lastly, the Ordinance prescribes political measures: these include a ban on holding political office for any person who exploited religion in the past in a way that contributed to the "national tragedy", and declaring inadmissible any proceedings brought against individuals or groups who are members of any branch of Algeria's defence and security forces for actions undertaken to protect persons and property, safeguard the nation and preserve the institutions of the Republic.

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[2] The State party cites communication No. 210/1986 and communication No. 225/1987, *Pratt and Morgan v. Jamaica*, Views adopted on 6 April 1989.

4.7 The sovereign people of Algeria have, according to the State party, agreed to a process of national reconciliation as the only way to heal the wounds inflicted. The proclamation of the Charter for Peace and National Reconciliation reflects a desire to avoid confrontation in the courts, media outpourings and political score settling. The State party is therefore of the view that the author's allegations are covered by the comprehensive domestic settlement mechanism provided for in the Charter.

4.8 The State party asks the Committee to note the similarities between the facts and situations described by authors, and between the sociopolitical and security contexts in which they occurred; to note that the authors have failed to exhaust all domestic remedies; to note that the authorities of the State party have established a comprehensive domestic mechanism for processing and settling the cases referred to in these communications through measures designed to achieve peace and national reconciliation that are consistent with the principles of the Charter of the United Nations and subsequent covenants and conventions; to find these communications inadmissible; and to request that authors seek the appropriate remedy.

The author's comments on the State party's submission

5.1 In her comments of 25 April 2013, the author considers that the State party's adoption of domestic legislative and administrative measures to support the victims of the "national tragedy" cannot be invoked at the admissibility stage to prohibit individuals subject to its jurisdiction from using the procedure provided for under the Optional Protocol. In the case in point, the legislative measures adopted are themselves a violation of the rights enshrined in the Covenant, as the Committee has previously observed.[3]

5.2 The author recalls that Algeria's declaration of a state of emergency on 9 February 1992 does not affect people's right to submit individual communications to the Committee. The author therefore considers that the State party's observations on the appropriateness of the communication do not constitute a ground for inadmissibility.

5.3 As to the State party's argument that the requirement to exhaust domestic remedies calls on the author to institute criminal proceedings by filing a complaint with the investigating judge, in accordance with articles 72 ff. of the Code of Criminal Procedure, the author refers to the Committee's jurisprudence,[4] and considers that, given the serious nature of the alleged offences, the fact that the family did not sue for damages cannot be invoked as a means to offset the lack of the criminal proceedings that should have been initiated by the State party on its own initiative. Both the judicial and the government authorities were informed of the disappearance of Nour-Eddine Mihoubi but the circumstances surrounding his disappearance, as well as his current whereabouts, remain unknown. The State party has not fulfilled its duty to investigate and establish the facts about all serious violations of human rights.

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[3] Concluding observations of the Human Rights Committee, Algeria, CCPR/C/DZA/CO/3, (12 December 2007), paras. 7, 8 and 13. Communication No. 1588/2007, *Daouia Benaziza v. Algeria*, Views adopted on 26 July 2010, para. 9.2; and concluding observations of the Committee against Torture, Algeria, CAT/C/DZA/CO/3, 16 May 2008, paras. 11, 13 and 17.

[4] Communication No. 1588/2010, *Benaziza v. Algeria*, Views adopted on 27 July 2010, para. 8.3.

5.4 As to the State party's argument that mere "subjective belief or presumption" does not exempt the author of a communication from the requirement to exhaust all domestic remedies, the author cites articles 45 and 46 of Ordinance 06-01. The State party has not convincingly demonstrated how suing for damages would have enabled the competent courts to receive and investigate the complaint, since this would involve violating article 45 of the Ordinance, or how the author could have been guaranteed immunity from prosecution under article 46 of the Ordinance. A reading of these provisions leads to the conclusion that any complaint regarding the violations suffered by the author and her son would be not only declared inadmissible but also treated as a criminal offence. The author notes that the State party fails to provide an example of any case which, despite the existence of the above-mentioned Ordinance, has led to the effective prosecution of the perpetrators of human rights violations in a similar case.

5.5 With regard to the merits of the communication, the author notes that the State party has simply listed the general scenarios in which the victims of the "national tragedy" might have disappeared. Such general observations do not dispute the allegations made in the present communication. Furthermore, the comments are listed in the same way as in a number of other cases, thus demonstrating the State party's continuing unwillingness to consider such cases individually and to accept its responsibility to the author of this communication, for the suffering that she and her family have endured.

5.6 The author invites the Committee to consider her allegations substantiated given that she is unable to provide additional information in support of her communication, as only the State party has exact information about her son's fate.

5.7 The author considers that the absence of a response on the merits of the communication constitutes a tacit acknowledgement of the accuracy of the facts alleged. The State party's silence constitutes a recognition of failure in its duty to carry out an investigation into the case of enforced disappearance brought to its attention, as otherwise it would have been in a position to provide a detailed response based on the results of the investigations that it should have conducted. With regard to the merits, the author maintains all the allegations set out in her initial communication.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Firstly, the Committee recalls that the Special Rapporteur's decision to examine the admissibility and the merits jointly does not preclude their being considered separately by the Committee. The decision to consider the admissibility and the merits jointly does not mean they must be considered simultaneously. Consequently, before considering any claim contained in a communication, the Human Rights Committee must decide, in accordance with rule 93 of its rules of procedure, whether the communication is admissible under the Optional Protocol to the Covenant.

6.2 Under article 5, paragraph 2 (a), of the Optional Protocol, the Committee must ascertain that the same matter is not being examined under another procedure of international investigation or settlement. The Committee notes that the disappearance of Nour-Eddine Mihoubi was reported to the Working Group on Enforced or Involuntary

Disappearances. However, it recalls that extra-conventional procedures or mechanisms established by the Commission on Human Rights or the Human Rights Council, and whose mandates are to examine and report publicly on human rights situations in specific countries or territories or on cases of widespread human rights violations worldwide, do not generally constitute an international procedure of investigation or settlement within the meaning of article 5, paragraph 2 (a), of the Optional Protocol.[5] Accordingly, the Committee considers that the examination of Nour-Eddine Mihoubi's case by the Working Group on Enforced or Involuntary Disappearances does not render it inadmissible under this provision.

6.3 The Committee notes that, in the State party's view, the author has not exhausted domestic remedies since she did not consider the possibility of bringing the matter before the investigating judge and suing for damages in criminal proceedings under articles 72 and 73 of the Code of Criminal Procedure. The Committee also notes that, according to the State party, the author has simply written letters to political and administrative authorities and petitioned advisory or mediation bodies and representatives of the prosecution service and that she has not, strictly speaking, initiated legal action and seen it through to its conclusion by availing herself of all available remedies of appeal. The Committee notes in this respect that the day after Nour-Eddine Mihoubi's arrest the author contacted the police in Bou Saâda without success. She subsequently filed a complaint about her son's abduction with the public prosecutor of Bou Saâda, following which it was expressly acknowledged that the Bou Saâda local police had arrested Nour-Eddine Mihoubi and that he had been transferred to the custody of the police of the *wilaya* of Algiers on 7 February 1993. The family also contacted the public prosecutor of Algiers, and repeatedly petitioned representatives of the Government of the State party, the National Human Rights Observatory and its successor body, without success. None of these actions resulted in effective investigations or the prosecution and conviction of those responsible.

6.4 The Committee recalls that the State party has a duty not only to conduct thorough investigations of alleged violations of human rights brought to the attention of its authorities, including in particular enforced disappearances and violations of the right to life, but also to prosecute, try and punish any person assumed to be responsible for such violations.[6] Although the author repeatedly contacted the competent authorities about her son's disappearance, the State party failed to conduct a thorough and effective investigation, despite the fact that serious allegations of enforced disappearance were involved. The State party has also failed to provide sufficient evidence that an effective remedy is de facto available, since Ordinance No. 06-01 of 27 February 2006 continues to be applicable despite the Committee's recommendations that it should be brought into line with the Covenant.[7] Moreover, given the vague wording of articles 45 and 46 of the Ordinance, and in the absence of satisfactory information from the State party about their interpretation and actual enforcement, the author's fears about the effectiveness of filing a complaint are reasonable. The Committee recalls that, for the purposes of admissibility of a communication, the authors must exhaust only the remedies effective against the alleged violation – in the present case, remedies effective against enforced disappearance. Furthermore, recalling its jurisprudence, the Committee considers that to sue for damages for offences as serious as those alleged in the present case cannot be considered a substitute for the charges that should have been brought by the State Prosecutor.[8] The Committee therefore concludes that article 5, paragraph 2 (b), of the Optional Protocol is not an obstacle to the admissibility of the communication.

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[5] Communication No. 1781/2008, *Djebrouni v. Algeria*, Views adopted on 31 October 2011, para. 7.2.

[6] See, inter alia, communication No. 1905/2009, *Ouaghlissi v. Algeria*, Views adopted on 26 March 2012, para. 6.4.

[7] Concluding observations of the Human Rights Committee, Algeria, CCPR/C/DZA/CO/3 (12 December 2007), paras. 7, 8 and 13.

[8] See, inter alia, communication No. 1905/2009, *Ouaghlissi v. Algeria*, para. 6.4.

6.5 The Committee considers that the author has sufficiently substantiated her claims insofar as they raise issues under articles 6, 7, 9, 10, 16 and 2 (para. 3) of the Covenant, and therefore proceeds to consider the communication on the merits.

Consideration of the merits

7.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as required under article 5, paragraph 1, of the Optional Protocol.

7.2 The State party has provided general and collective comments on the serious allegations made by the author, and has merely argued that communications incriminating public officials or persons acting on behalf of public authorities in cases of enforced disappearance between 1993 and 1998 should be looked at in the broader context of the sociopolitical and security environment that prevailed in the country during a period in which the Government had to combat terrorism. The Committee observes that the Covenant demands that the State party show concern for the fate of every individual and treat every individual with respect for the inherent dignity of the human being. In addition, the Committee recalls its jurisprudence,[9] according to which the State party may not invoke the provisions of the Charter for Peace and National Reconciliation against persons who invoke provisions of the Covenant or who have submitted or may submit communications to the Committee. Without the amendments recommended by the Committee, Ordinance No. 06-01 appears to promote impunity and therefore cannot, as it currently stands, be considered compatible with the Covenant.[10]

7.3 The Committee notes that the State party has not replied to the author's claims concerning the merits of the case, and recalls its jurisprudence,[11] according to which the burden of proof should not rest solely on the author of a communication, especially given that the author and the State party do not always have the same degree of access to evidence and that often only the State party is in possession of the necessary information. It is implicit in article 4, paragraph 2, of the Optional Protocol that the State party has a duty to investigate in good faith all allegations of violations of the Covenant made against it and its representatives and to provide the Committee with whatever information is available to it.[12] In the absence of any explanations from the State party in this respect, due weight must be given to the author's allegations, provided that they have been sufficiently substantiated.

7.4 The Committee notes that, according to the author, her son has been missing since his arrest on 27 January 1993 and that although the authorities have admitted to arresting him, they have failed to conduct any effective investigation that might shed light on his fate. It notes that, according to the author, the chances of finding Nour-Eddine Mihoubi alive are minimal, and that his prolonged absence suggests that he died while in detention; that incommunicado detention creates an unacceptable risk of violation of the right to life, since victims are at the mercy of their jailers who, by the very nature of the circumstances, are subject to no oversight. The Committee notes that the State party has produced no evidence to refute these allegations. The Committee concludes that the State party has failed in its duty to protect Nour-Eddine Mihoubi's life, in violation of article 6, paragraph 1, of the Covenant.[13]

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[9] See, inter alia, communications No. 1781/2008, *Djebrouni v. Algeria*, para. 8.2; and No. 1905/2009, *Ouaghlissi v. Algeria*, supra, note 6, para. 7.2

[10] See the Committee's concluding observations on Algeria, CCPR/C/DZA/CO/3, para. 7 (a).

[11] See inter alia, communication No. 1791/2008, *Boudjemai v. Algeria*, Views adopted on 7 March 2013, para. 8.3.

[12] See communication No. 1297/2004, *Medjnoune v. Algeria*, Views adopted on 14 July 2006, para. 8.3.

7.5 The Committee recognizes the degree of suffering involved in being held indefinitely without contact with the outside world. It recalls its general comment No. 20 on article 7, which recommends that States parties should make provision against incommunicado detention. The Committee notes that, according to the author, Nour-Eddine Mihoubi was arrested by police officers from Bou Saâda on 27 January 1993 in Diss (Bou Saâda), at the home of his brother, who was also arrested on the same day. Furthermore, according to fellow prisoners who had since been released, he was subjected to acts of torture at the hands of his jailers at the Châteauneuf detention centre. In the absence of a satisfactory explanation from the State party, the Committee finds multiple violations of article 7 of the Covenant in respect of Nour-Eddine Mihoubi.[14]

7.6 The Committee also takes note of the anguish and distress that the disappearance of Nour-Eddine Mihoubi has caused his mother, the author. It considers that the facts before it disclose a violation of article 7 of the Covenant, with regard to the author.[15]

7.7 With regard to the alleged violation of article 9, the Committee notes the author's claim that Nour-Eddine Mihoubi was arrested on 27 January 1993 by the police, without explanation; that following his arrest, he was detained at the Bou Saâda police station, where he was apparently held for 11 days until he was transferred to the custody of the police of the *wilaya* of Algiers. According to information received subsequently by his family, Nour-Eddine Mihoubi was then transferred to the Châteauneuf detention centre, where he was allegedly detained incommunicado for 18 months and subjected to torture. The authorities of the State party have since failed to provide the family with any information about the fate of Nour-Eddine Mihoubi. Although, according to a letter sent to the family by the National Human Rights Observatory on 12 May 1996, the victim was wanted under an arrest warrant issued by the Special Court on 31 March 1993, that is two months after his arrest, he was not questioned and was not brought before a judicial authority, which would have enabled him to challenge the lawfulness of his detention. Moreover, although the public prosecutor of Bou Saâda acknowledged Nour-Eddine Mihoubi's arrest and detention, the author and her family were not given any official information about the victim's whereabouts or fate. In the absence of a satisfactory explanation from the State party, the Committee finds a violation of article 9 of the Covenant with regard to Nour-Eddine Mihoubi.[16]

7.8 With regard to the complaint under article 10, paragraph 1, the Committee reiterates that persons deprived of their liberty may not be subjected to any hardship or constraint other than that resulting from the deprivation of liberty and that they must be treated with humanity and respect for their dignity. In view of his incommunicado detention and in the absence of information provided by the State party in that regard, the Committee finds a violation of article 10, paragraph 1, of the Covenant with regard to Nour-Eddine Mihoubi.[17]

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[13] See communication No. 1831/2008, *Larbi v. Algeria*, Views adopted on 25 July 2013, para. 8.4.

[14] See, inter alia, communications No. 1295/2004, *El Awani v. Libyan Arab Jamahiriya*, Views adopted on 11 July 2007, para. 6.5; and No. 1422/2005, *El Hassy v. Libyan Arab Jamahiriya*, Views adopted on 24 October 2007, para. 6.2.

[15] See inter alia, communications No. 1905/2009, *Ouaghlissi v. Algeria*, supra, note 6, para. 7.6; and No. 1781/2008, *Djebrouni v. Algeria*, supra, note 5, para. 8.6.

[16] See, inter alia, communications No. 1905/2009, *Ouaghlissi v. Algeria*, para. 7.7; and No. 1781/2008, *Djebrouni v. Algeria*, para. 8.7.

[17] See general comment No. 21 (1992) on article 10, paragraph 3, and, inter alia, communication No. 1780/2008, *Mériem Zarzi v. Algeria*, Views adopted on 22 March 2011, para. 7.8.

7.9 With regard to the alleged violation of article 16, the Committee reiterates its settled jurisprudence, according to which the intentional removal of a person from the protection of the law for a prolonged period of time may constitute a refusal to recognize that person as a person before the law if the victim was in the hands of the State authorities when last seen and if the efforts of his or her relatives to obtain access to potentially effective remedies, including judicial remedies (Covenant, art. 2, para. 3), have been systematically impeded.[18] In the present case, the Committee notes that the authorities of the State party have failed to provide the family with any information about the fate of Nour-Eddine Mihoubi since his arrest on 27 January 1993, in spite of the numerous requests sent to various authorities. The Committee concludes that Nour-Eddine Mihoubi's enforced disappearance for more than 20 years denied him the protection of the law and deprived him of his right to recognition as a person before the law, in violation of article 16 of the Covenant.

7.10 The author invokes article 2, paragraph 3, of the Covenant, which imposes on States parties the obligation to ensure an effective remedy for all persons whose Covenant rights have been violated. The Committee attaches importance to the establishment by States parties of appropriate judicial and administrative mechanisms for addressing claims of rights violations. It refers to its general comment No. 31 (2004), which states that a State party's failure to investigate allegations of violations could in itself give rise to a separate breach of the Covenant. In the present case, although the victim's family repeatedly contacted the competent authorities regarding Nour-Eddine Mihoubi's disappearance, including judicial authorities such as the prosecutors of Algiers and Bou Saâda, all their efforts proved futile and the State party failed to conduct a thorough and effective investigation into his disappearance, even though he had been arrested by State officials, and they had even acknowledged his arrest. Furthermore, the absence of the legal right to undertake judicial proceedings since the promulgation of Ordinance No. 06-01 implementing the Charter for Peace and National Reconciliation continues to deprive Nour-Eddine Mihoubi and his family of any access to an effective remedy, since the Ordinance prohibits, on pain of imprisonment, the pursuit of legal remedies to shed light on the most serious crimes, such as enforced disappearances.[19]

7.11 The Committee further notes that Nour-Eddine Mihoubi's family began the process of obtaining an official declaration of death, which led to an official recognition of his disappearance on 12 April 2007, pursuant to articles 26 ff. of Ordinance No. 06-01, which provide that once a certificate of disappearance has been issued by the judicial police, a declaration of death may be obtained at the request of the beneficiaries, giving them the right to compensation, to the exclusion of any other form of redress (see paragraph 2.9 above). The Committee notes that the compensation offered is dependent on the recognition, by the family, that the missing family member is deceased. The Committee recalls that the State party has an obligation to carry out thorough and effective investigations of serious violations of human rights, including enforced disappearances, independently of any political "national reconciliation" measures that it might undertake. The Committee considers, in particular, that the provision of compensation must not be made contingent upon the issuance of a declaration of death in respect of a disappeared person in a civil procedure.[20]

7.12 In the light of the foregoing, the Committee finds that the facts before it reveal a violation of article 2 (para. 3), read in conjunction with articles 6, 7, 9, 10 and 16 of the

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[18] Communication No. 1905/2009, *Ouaghlissi v. Algeria*, supra, note 6, para.7.8.

[19] CCPR/C/DZA/CO/3, para. 7.

[20] See communication No. 1798/2008, *Azouz v. Algeria*, Views adopted on 25 July 2013, para. 8.11.

Covenant, with regard to Nour-Eddine Mihoubi, and of articles 2 (para. 3), read in conjunction with article 7 of the Covenant with regard to the author.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the information before it discloses violations by the State party of articles 6, 7, 9, 10, 16, and article 2 (para. 3) read in conjunction with articles 6, 7, 9, 10 and 16, of the Covenant with regard to Nour-Eddine Mihoubi. The Committee also finds a violation of articles 7, and article 2 (para. 3) read in conjunction with article 7, of the Covenant with regard to the author.

9. In accordance with article 2, paragraph 3, of the Covenant, the State party is under an obligation to guarantee Nour-Eddine Mihoubi's family an effective remedy, including by: (a) conducting a thorough and effective investigation into Nour-Eddine Mihoubi's disappearance; (b) providing his family with detailed information about the results of its investigation; (c) releasing him immediately if he is still being detained incommunicado; (d) in the event that Nour-Eddine Mihoubi is deceased, handing over his remains to his family; (e) prosecuting, trying and punishing those responsible for the violations committed; and (f) providing adequate compensation to Nour-Eddine Mihoubi's family for the violations suffered, and also to Nour-Eddine Mihoubi if he is still alive. Notwithstanding the terms of Ordinance No. 06-01, the State party should ensure that it does not impede enjoyment of the right to an effective remedy by victims of crimes such as torture, extrajudicial killings and enforced disappearances. The State party is also under an obligation to take steps to prevent similar violations in the future.

10. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether or not there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when a violation has been established, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views and to have them widely disseminated in the official languages of the State party.

[Adopted in English, French and Spanish, the French text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Appendix

Individual opinion by Mr. Fabián Omar Salvioli and Mr. Victor Manuel Rodríguez-Rescia

1. We share the opinion of the Committee and the conclusions it has reached in the *Mihoubi v. Algeria* case (communication No. 1874/2009). Nevertheless, we believe that the Committee should have indicated that, by its adoption of Ordinance No. 06-01, which contains provisions, particularly article 46, which are clearly incompatible with the Covenant, the State has failed to comply with the general obligation set forth in article 2, paragraph 2 of the Covenant. The Committee should also have found a violation of article 2, paragraph 2, read in conjunction with other substantive provisions of the Covenant. We consider that in the redress ordered, the Committee should have recommended that the State party bring Ordinance No. 06-01 in line with the provisions of the Covenant. Lastly, we are convinced that the obligation for the family of the victim to apply for a declaration of death constitutes cruel and inhuman treatment as described in article 7 of the Covenant and that the Committee should have mentioned that in its Views.

2. There is currently a difference of opinion within the Committee over the application of the *iura novit curia* principle, which authorizes an international body to apply the law in the manner it considers appropriate in accordance with the proven facts of the case and regardless of the legal claims of the parties.

3. The *iura novit curia* principle has been applied by the international bodies for almost a century: it was introduced by the Permanent Court of International Justice, the predecessor of the International Court of Justice,[a] and then taken up by the European Court of Human Rights[b] as established case law,[c] and both precedents have established the current practice of other bodies such as the Inter-American Commission and Court of Human Rights[d] and the African Commission on Human and Peoples' Rights.[e]

4. The position that it is not feasible to adopt the *iura novit curia* principle for individual cases before the Committee disregards the fact that the Committee's case law provides several precedents in which the Committee clearly applied articles that had not been invoked by the parties (*iura novit curia*); we have cited some of these cases in previous individual opinions.[f]

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[a] Permanent Court of International Justice, the case of the S.S. "Lotus", 1927, Series A No. 10, page 31.

[b] European Court of Human Rights, *Handyside v. the United Kingdom*, 7 December 1976, Series A No. 24, para. 41.

[c] European Court of Human Rights, *Powell and Rainer v. the United Kingdom*, 21 February 1990, Series A No. 172, para. 29; *Guerra and others v. Italy*, 19 February 1998, Reports of Judgments and Decisions 1998-I, para. 44; *Scoppola v. Italy (2)*, [GC] No. 10249/03, 17 September 2009, para. 54; and more recently *G.R. v. the Netherlands*, No. 22251/07, 10 January 2012, paras. 35–36.

[d] Inter-American Court of Human Rights, *Godínez Cruz*; Series C No. 5, judgment of 20 January1989, para. 172. The Court applied the same principle in all of its subsequent judgments.

[e] See, for example, *Antoine Bissangou v. the Republic of Congo*, African Commission on Human and Peoples' Rights, communication No. 253/2002 (2006); the complainant alleged violations of articles 2, 3 and 21 (2); the Commission found that there had been violations of articles 3, 7 and 14 of the African Charter of Human and Peoples' Rights.

[f] Human Rights Committee: communication No. 1390/2005, *Koreba v. Belarus*, Views adopted on 25 October 2010; communication No. 1225/2003, *Eshonov v. Uzbekistan*, Views adopted on 22 July 2010, para. 8.3; communication No. 1206/2003, *R.M. and S.I. v. Uzbekistan*, Views adopted on 10

5. Consequently, the *iura novit curia* principle is proper to the practice of the international judicial and quasi-judicial bodies at the global (United Nations) and regional (European, inter-American and African) levels; the Human Rights Committee should not abandon this prerogative and adopt in its place practices more proper to national civil or common law systems, which follow a completely different rationale from that governing the operation of the international human rights systems.

6. It is not a question either of utility or of convenience, criteria which should be alien to the work of an international human rights body. The issue is the proper application of the law. In particular, when the facts of the case described and confirmed show that there was a violation, the Committee must set the case within the proper legal framework.

7. By proceeding in the same way as the international human rights bodies and applying the *iura novit curia* principle, the Committee will not only establish a consistent case law in response to the same proven facts (which is not only desirable, but logical), it will avert the risk of becoming a prisoner of possible political speculation by the parties to a dispute.

8. In the case at hand there are various proven facts which entail violations of the Covenant. The Committee has correctly identified several of them, but has omitted to identify the adoption of a norm which is incompatible with the Covenant (constituting non-compliance by the State party with the general obligation under article 2, paragraph 2, and in consequence affecting various substantive rights) as one of them.

9. It is the established practice of the Committee to find violations of article 2, paragraph 3, of the Covenant, and it does so even in the case of the present communication; in legal terms, there is no reasonable explanation of why it is unable to perform the same interpretation in respect of article 2, paragraph 2.

10. The absence of a suitable legal framework is not a purely theoretical or academic matter; it also has an impact on remedies. Although welcome advances in this area have been made in recent years, in our view the forms of remedy recommended in such cases in the past are incomplete. In the case at hand, the Committee has failed to recommend, as a means of redress, the adjustment by law of Ordinance No. 06-01 to the provisions of the Covenant, which is indispensable to guarantee that such incidents do not occur again.

11. In conclusion, the Committee should have specifically indicated that to oblige the family of a disappeared person to acknowledge the person's death as a means of obtaining compensation constitutes cruel and inhuman treatment, and consequently a violation of article 7 of the Covenant. Instead, the Committee addresses the issue as a violation of the right to redress for the victims of human rights violations, and consequently finds a violation of article 2, paragraph 3, read in conjunction with article 7 (Views, paras. 7.11 and 7.12).

12. The author restricts herself to stating that the family requested a declaration of death pursuant to Ordinance No. 06-01 of 27 February 2006 (Views, para. 2.9) but fails to identify this fact as a violation of her rights, since she makes no reference to it either in the complaint or in her comments on the State party's submission.

March 2010, paras. 6.3 and 9.2, resulting in a finding of non-violation; communication No. 1520/2006, *Mwamba v. Zambia*, Views adopted on 10 March 2010; communication No. 1320/2004, *Pimentel et al. v. the Philippines*, Views adopted on 19 March 2007, paras. 3 and 8.3; communication No. 1177/2003, *Ilombe and Shandwe v. the Democratic Republic of the Congo*, Views adopted on 17 March 2006, paras. 5.5, 6.5 and 9.1; communication No. 1044/2000, *Shukurova v. Tajikistan*, Views adopted on 17 March 2006, para. 3; and communication No. 973/2001, *Khalilova v. Tajikistan*, Views adopted on 30 March 2005, para 3.7.

13. Nonetheless — we repeat the point — the Committee addresses this fact in legal terms in paragraphs 7.11 and 7.12, as a result of which in this same case the Committee has applied law that was not invoked by the parties, in other words, the *iura novit curia* principle.

14. We do not disagree with the fact that the Committee has applied this principle to this part of the communication, but we believe that it would have been more appropriate from a legal perspective to have found that the requirement for the family to acknowledge the death of one of its members who has been a victim of enforced disappearance is a violation of article 7 of the Covenant, since it undoubtedly constitutes cruel and inhuman treatment.

[Done in English, French and Spanish, the Spanish text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Individual opinion by Mr. Gerald L. Neuman

1. I fully concur with the Views of the majority on this communication, both concerning what it decides and what it does not decide. I write here in order to give an explicit response, from my own perspective, to a dissenting argument in the separate opinion of my colleagues Mr. Fabián Omar Salvioli and Mr. Victor Manuel Rodriguez-Rescia. For the sake of brevity, I will assume that the reader is familiar with the Covenant and its interpretation, rather than spelling out the details that would be useful for an audience of general readers.

2. Since 2009, separate opinions have repeatedly urged the Committee to change its long-standing practice, and to include in its Views findings that a State party has violated article 2, paragraph 2, of the Covenant. This proposed conclusion could be understood either as a violation of article 2, paragraph 2, standing alone, or as a violation of article 2, paragraph 2, in conjunction with one or more substantive rights enumerated in articles 6 through 27 of the Covenant.

3. To my mind, these arguments do not make clear what practical value for the protection of human rights either version of this proposed change would serve.

4. I am aware that the Inter-American Court of Human Rights generally expresses its findings of violations of substantive provisions of the American Convention on Human Rights in a compound fashion, as a violation of the relevant substantive articles in relation to either article 1, paragraph 1, of the American Convention or article 2 of the American Convention (or both). The Inter-American Court may have had its own reasons for adopting this format in its first judgment, and maintaining it over time. The Human Rights Committee, in contrast, has been able since its own early years to find substantive provisions of the Covenant directly violated, without the need for an ancillary citation to article 2, paragraph 1 or paragraph 2, which would be the equivalent.

5. If the Committee's existing approach to article 2, paragraph 2, prevented the Committee from being able to address the contribution of particular laws in a State party to the violation at hand, then modifying that approach could serve a useful purpose. But, as is evident from the Views in the present case, the Committee is able to examine the effect of laws on victims before it.

6. If the Committee's existing approach to article 2, paragraph 2, prevented the Committee from being able to recommend changes to the legal framework in a State party that would protect the victim before it or similarly situated persons from future violations, then modifying that approach could serve a useful purpose. But, as is evident from the paragraph 9 of the Views in the present case, the Committee is able to make such recommendations. I may add that the Committee's phrasing of its recommendation in the penultimate sentence of paragraph 9 results from careful attention to the situation in the particular State party, and not from some abstract general practice.

7. Changing the Committee's approach not only seems to lack advantages, but would also involve disadvantages. The unnecessary addition of more abstract violations or more phrases of the form "article 2, paragraph 2, in conjunction with articles 6, 7, and 10, paragraph 1" would further impair the legibility of the Committee's Views, which are complicated enough already. Moreover, given the volume of communications that the Committee receives and the constraints on its meeting time, debates on whether or not a finding regarding article 2, paragraph 2, should be added in a particular case would reduce the time available for more productive discussions of other issues, or for giving more victims earlier decisions on their communications.

8. If the suggestion is to find violations of article 2, paragraph 2, taken in isolation, then adopting it would be inconsistent with the Committee's general practice of not finding isolated violations of any sub-provision of article 2 in communications. This practice helps ensure that communications concern victims who have been concretely affected with regard to specific rights, rather than persons objecting abstractly to the way a State party implements the Covenant.

9. It is also noteworthy that these separate opinions combine the call for findings of violation of article 2, paragraph 2, with a broad understanding of the doctrine "*iura novit curia*" as a duty of the Committee to find violations that arise on the facts, regardless of whether the parties to the communication have addressed them. To my mind, the Committee is properly cautious in its application of this doctrine to reformulate the claims made by authors. In the context of article 2, paragraph 2, it should also be taken into account that the laws of States parties are frequently written in languages that members of the Committee cannot read, and that the operative interpretation of a statute is not always apparent from its text. Information and argumentation from the parties can be very important to the Committee in evaluating how a State party's laws may have contributed to the violation at hand, and what may need to be changed in order to bring the legal framework into compliance with the Covenant.

10. Furthermore, recommending changes to a State party's laws generally implicates the interests of third parties who cannot participate in the proceedings on the individual communication. Unlike the Inter-American Court, this Committee operates under rules of confidentiality that deny the general public knowledge of pending cases and the opportunity to provide alternative perspectives to the Committee. At the same time, unlike the Inter-American Court, this Committee engages in a separate process of public examination of State parties' laws and practices under the periodic reporting procedure. I mention this, not to claim that evaluation of a statute should occur only in the reporting procedure, but to point out differences that may justify greater caution on the part of the Committee in addressing a statute in the context of an individual communication.

[Done in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Q. Communication No. 1881/2009, *Shakeel v. Canada* (Views adopted on 24 July 2013, 108th session)*

Submitted by:	Masih Shakeel (represented by counsel, Stewart Istvanffy)
Alleged victim:	The author
State party:	Canada
Date of communication:	24 June 2009 (initial submission)
Subject matter:	Deportation to Pakistan
Procedural issue:	Non-substantiation; incompatibility with the Covenant; and non-exhaustion of domestic remedies
Substantive issues:	Right to liberty and security; torture, cruel and inhuman treatment; right to life; right to an effective remedy
Articles of the Covenant:	2; 6, paragraph 1; 7; 9, paragraph 1; and 14
Article of the Optional Protocol:	5, paragraph 2 (b)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 24 July 2013,

Having concluded its consideration of communication No. 1881/2009, submitted to the Human Rights Committee by Mr. Masih Shakeel under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The author of the communication, dated 24 June 2009, is Masih Shakeel, a Christian pastor born in 1970 in Karachi, Punjab, Pakistan. His asylum application had been rejected in Canada, and at the time of submission of the communication, he faced imminent deportation to Pakistan.[1] He claims that his deportation to Pakistan would amount to a violation by Canada of articles 6, paragraph 1; 7 and 9, paragraph 1, of the Covenant.[2] He also raises allegations under article 14 of the Covenant with respect to the consideration of his asylum application. The author is represented by counsel, Stewart Istvanffy.

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* The following members of the Committee participated in the examination of the present communication: Mr. Yadh Ben Achour, Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Walter Kälin, Ms. Zonke Zanele Majodina, Mr. Kheshoe Parsad Matadeen, Ms. Iulia Antoanella Motoc, Mr. Gerald L. Neuman, Sir Nigel Rodley, Mr. Victor Manuel Rodríguez-Rescia, Mr. Fabián Omar Salvioli, Ms. Anja Seibert-Fohr, Mr. Yuval Shany, Mr. Konstantine Vardzelashvili and Ms. Margo Waterval.

The texts of two individual opinions by Committee members Mr. Yuval Shany, Mr. Cornelis Flinterman, Mr. Walter Kälin, Sir Nigel Rodley, Ms. Anja Seibert-Fohr and Mr. Konstantine Vardzelashvili, and by Mr. Yuji Iwasawa, respectively, are appended to the present Views.

1.2 On 25 June 2009, pursuant to rule 92 of its rules of procedure, the Committee, acting through its Special Rapporteur on new communications and interim measures, requested the State party not to remove the author to Pakistan while the communication was under consideration by the Committee. The Committee's request was granted.[3]

The facts as presented by the author[4]

2.1 The author is a Christian pastor from Karachi, Pakistan, who claims that he was constantly discriminated against by Muslim fundamentalists because of his Christian faith. He was forced to quit his job at the Karachi Water Board because of discrimination. Because it was very difficult for him to find a job, he started attending church more regularly, and was assigned the duty of evangelism in 2001. As an evangelist, he was often harassed by Muslim fundamentalists. Hatred against Christians grew even more after the United States-led invasion of Afghanistan in 2001, leading to the arson of several churches, and the assassination of Christian devotees. At the end of 2003, the author met with a well-established businessman, A. M., who wished to convert to Christianity. A.M. became friends with the author, and started visiting him at his home. A.M. became close to the author's wife and the author asked him to stop visiting them, but A.M. continued his visits in the author's absence, and started accusing the author of "working against Muslims", to draw the attention of local Maulvis (Muslim religious scholars). On his way home on 4 February 2004, the author was beaten by unknown assailants, who threatened to burn him alive if he went against A.M. The author sought assistance from the police, to no avail.

2.2 On 15 April 2004, the author's wife and daughter were abducted by unknown men. The author reported the incident to the police, but no written report was made. On 20 April 2004, the author received a message delivered on behalf of A.M. telling him that his wife and daughter were in Kandahar, Afghanistan, and that he would need to travel to Afghanistan to see them again. The author agreed, but on 24 April 2004, he was abducted by three men who drove him to the Afghan border, and ordered him to tell the border guard that he was there to dig trenches. The author was sent to a camp near the border, but thereafter expelled to Pakistan, even though he tried to explain that his wife was probably in Kandahar.

2.3 The author returned to Pakistan,[5] but not to Karachi. Instead, he settled in a Christian colony in Quetta, and thereafter in Hyderabad. He maintained contact with his brother, who advised him not to return to Karachi, as he was being looked for there. The author then moved to Sri Lanka for safety reasons,[6] but subsequently learned from his brother that A.M. had proposed a deal for the return of his wife and daughter, which prompted the author to go back to Karachi, although he did not find his family once back there. The author then went to live in Kashmir Colony[7] with Christian friends.

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[1] A deportation order against the author was issued, scheduling his deportation for 26 June 2009, i.e. two days after the submission of his communication before the Committee.

[2] The Optional Protocol entered into force for Canada on 20 August 1976.

[3] The State party informed the Committee, in its submission of 18 April 2013, that despite having no legal right to remain in Canada, the author, at the request of the Committee, had not been deported to Pakistan (see para. 6.1 below).

[4] For the purposes of clarity, this part is based on the author's submission, as well as on his applications before domestic jurisdictions of the State party, and related decisions adopted.

[5] No date provided.

[6] No date provided.

2.4 On 6 October 2004, fundamentalist Maulvis hung a written note on the door of the author's house in Karachi, accusing him of burning the Koran and instigating the public to kill him.[8] The author's brother brought him the note and also provided a copy to the police. Instead of assisting him, the police advised him to "learn to live with the majority" in Pakistan. The author returned to Sri Lanka, where he applied for asylum with the United Nations High Commissioner for Refugees, which was denied.[9] He continued living in Sri Lanka at an Apostolic Church, which assigned him various duties assisting victims of the tsunami.

2.5 On 15 February 2005, a fatwa was issued against the author, accusing him of blasphemy against Islam, and stating that "Pastor Shakeel and his whole family are at fault", and that "all of them have to be killed".[10] On 4 June 2005, a First Information Report was filed against him, in his absence, by the same complainant who signed the fatwa of 15 February 2005. The report states that, on 4 June 2005 (the same day the report was filed), the author was among a group of Christians bearing large pieces of wood, steel rods and stones, and speaking against Islam as they passed in front of a mosque (Jam'a Masjid Hanfiya Trust, Manzoor Colony), which they attacked with stones. The report names the author, among other suspects, portrays him as the leader of the group and accuses him of preaching about the Christian faith. At the end of the report, the Karachi police expressly indicate that the facts reported constitute offences under the Pakistani Criminal Code, including section 295 (blasphemy law).

2.6 The author decided to go to Canada. He was able to obtain a visa through the Church, and arrived in Montreal on 6 September 2006 on a visitor's visa. From Canada, the author maintained contact with his brother, who continued to advise him never to return to Pakistan, and to give up the idea of finding his wife and daughter, as it would be too dangerous for him to return.

2.7 The author applied for refugee protection in Montreal in February 2007.[11] On 16 May 2008, the Refugee Protection Division of the Canadian Immigration and Refugee Board (IRB) heard the author's claims. On 8 July 2008, the IRB rendered its decision, finding that the author was not a "Convention Refugee", and not a person in need of protection. The Board noted several contradictions in the author's allegations, and rejected his allegation that his wife and daughter had been kidnapped and that he had fled to Sri Lanka to avoid persecution. It thus gave no probative value to the documentary evidence he had submitted in support of his allegation that false charges and a fatwa had been issued against him. The Board further considered the human rights situation in Pakistan, and determined that incidents of violence against Christians are isolated, concluding that there was no more than a mere possibility that the author would face persecution due to his religion upon deportation. On 26 November 2008, the Federal Court denied the author's application for leave to apply for judicial review of the IRB decision.

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[7] A neighbourhood in Jamshed Town, which lies in the central part of Karachi. The Karachi City-District has 18 autonomous constituent towns, of which Jamshed Town is one.

[8] Note (undated) (original and translation from Urdu to English) is available on file. It reads: "Pastor Shakeel Masih … is an enemy of Islam. He took the Koran from the Madrasa. I saw Pastor Shakeel with my own eyes. He burned the Koran … If you find him anywhere, shoot him. Never forgive this kind of people. Anyone who sees him can shoot him on the spot".

[9] No reasons or decision provided.

[10] Annexed to the file (original and translation from Urdu to English).

[11] The author does not provide a date for his asylum application. It appears from the State party's submission that the author's Personal Information Form is stamped 12 March 2007.

2.8 On 6 February 2009, the author applied for a pre-removal risk assessment (PRRA) on the same grounds as his initial asylum application, submitting new documentary evidence, including a letter and complaint to the police from his brother, who asserted that he had been beaten by unknown individuals who were looking for the author.[12] Subsequently, on 3 April 2009, the author submitted a photo of his dead brother, who had died as a result of internal bleeding following the attack on him. On 16 March 2009, the author's PRRA application was rejected, as a result of which the removal order against the author became enforceable.[13] The PRRA Officer rejected most of the evidence submitted, as it was not clear whether such evidence had been available before the IRB decision. With respect to the police report filed by the author's brother, subsequent to his assault by unknown individuals, the PRRA Officer established that the police "were not a witness to the alleged events", and thus gave it no probative value as evidence of a threat against the author or even his brother, which it considered to be of a "self-serving" nature.

2.9 On 4 June 2009, the author applied to the Federal Court for leave to apply for judicial review of his PRRA decision. On 17 June 2009, pending the result of his leave application with respect to the negative PRRA decision, the author brought a motion before the Federal Court asking for a stay of execution of the removal order against him. The Court denied his application on 22 June 2009. While it accepted that the author's brother had been beaten to death by unknown individuals, and that the author had been suicidal and was desperately afraid to return to Pakistan, the Court found it insufficient to establish a serious issue, as the author had the burden to satisfy the Court that he had serious grounds to question the legality of the PRRA decision, which he had failed to do. On 22 September 2009, the Federal Court denied leave to appeal against the negative PRRA decision of 16 March 2009.

2.10 On 18 March 2009, the author applied for permanent residence in Canada on humanitarian and compassionate grounds ("H&C"), which remains pending.[14] The author claims that he has exhausted all remedies available to him, which would have the effect of preventing his deportation to Pakistan.

The complaint

3.1 The author submits that his deportation from Canada to Pakistan would expose him to the risk of almost certain death and a real risk of arbitrary detention, torture, and extrajudicial execution. In the past, the author had been threatened by radical Muslims with connections to Sunni extremists linked to the Sipah-E-Sahaba, one of the most dangerous organizations in Pakistan, whose determination to kill Christians is notorious. According to the author, the Pakistani authorities have no control over this movement. He also refers to the extent of sectarian terrorism in Pakistan, in general, and the lack of State protection available.

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[12] The author annexes to the file a police report (translation from Urdu to English) filed by his brother on 10 January 2009, in which he claimed to have been beaten by two unknown individuals, who were looking for the author. His brother reported that, after telling them that the author was not in Karachi, he was threatened, insulted, punched and kicked, resulting in extreme pain in his abdomen and back. (It is reported that the author's brother subsequently died of internal bleeding as a result of this attack).

[13] The deportation was scheduled for 26 June 2009.

[14] At the time of the author's submission to the Committee, submission of the State party's observations on admissibility and merits, and the latest submission from the State party on 18 April 2013 (see para. 6.1 below) this procedure was still pending in the author's case. Under this procedure, the test is whether an applicant would suffer unusual, undeserved or disproportionate hardship if he or she had to apply for a permanent residency visa from outside of Canada. There is no limit to the number of H&C applications which may be filed, although an application fee is required.

3.2 Regarding the country situation, the author refers to several international non-governmental reports which had commented upon the blasphemy law, including a report by the International Crisis Group, which stressed that, since 1991, blasphemy cases have carried a mandatory death penalty, although it has never been carried out. The report also stressed that the blasphemy law remains a "lethal weapon in the hands of religious extremists and the handiest instrument for mullahs" to persecute rivals, particularly members of the Christian community, as well as liberals. The author further cites the Human Rights Commission of Pakistan, which reported that in blasphemy cases involving minorities, lower courts invariably convict the accused; that religious groups pressure the police into lodging charges under the blasphemy law; and that in October 1997, a Lahore High Court judge who had acquitted a teenage boy of blasphemy was shot dead in his chambers.

3.3 In light of the circumstances described, the author contends that the fatwas and First Information Report filed against him under the blasphemy law constitute irrefutable evidence that his life will be in danger should he be returned to Pakistan. If he is arrested on account of the false accusations brought against him, he will face a substantial risk of torture at the hands of the Pakistani police, and his right to life will be in danger. He has tried on several occasions to seek help from the police, including after he was beaten, after his wife and daughter were abducted, and after his life was threatened, always to no avail.[15] He was involved in most of the religious events in his church, and is also well known to the Pakistani Christian community in Montreal.[16] Consequently, there is no viable possibility for him to hide in Pakistan. He reiterates that, as a member of the Christian minority community, the danger he faces in the event of his return is real, and that the deportation order against him is tantamount to a death sentence.

3.4 The author further submits that, were he returned to Pakistan, his mental health would be at risk. He submits several medical reports, which establish that he suffers from depression, mental fatigue and anxiety as a result of multiple causes, including the disappearance of his wife and daughter, fear for his life in the event of return, and deep grief and a sense of guilt surrounding his brother's death. The reports also describe his suicidal ideation following his brother's death and in connection with his fear of being forcibly returned to Pakistan. Since a date for his forced removal to Pakistan was scheduled, the author's suicidal symptoms have been exacerbated, which, according to medical reports, indicates deep suffering, and suggest that the author is in a situation of danger, needing intensive psychological care, and in need, foremost, of protection by the Canadian Government to be allowed to live in a country in which he feels safe. In conclusion, the author submits that his deportation by the State party to Pakistan would constitute a violation of his rights under articles 6, paragraph 1; 7, and 9, paragraph 1, of the Covenant.

3.5 The author also challenges the refugee determination and asylum procedures under articles 2 and 14 of the Covenant, noting that his case illustrates the absence of any valid domestic remedy in the State party. While the Federal Court has recognized that the author's brother was the victim of a violent death, and that the author is suicidal, it nonetheless rejected the latter's application for a stay of deportation. According to the author, the current PRRA procedure and H&C review are not in line with the State party's obligation to provide individuals with an effective remedy. The risk assessment is carried out by immigration agents who lack competence in human rights or legal matters in general, and who lack impartiality. Such decisions are adopted in pursuance of the

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[15] No further details are provided as to the specific action taken.

[16] The author annexes several letters from members of the Christian community in Montreal, which describe him as an active and committed member of the local Pakistani Christian community.

"enforcement side" of immigration, with considerable pressure to increase deportation numbers. He further notes that the stay of deportation filed on his behalf was pleaded on 22 June 2009, and rejected on the same day, on the ground that the Court could not take into account the risk of irreparable harm, based on the same allegations which had previously been presented before the Immigration and Refugee Board or the PRRA Officer. According to the author, this shows the futility of the procedure for a motion before the Federal Court to stay a deportation. He adds that when there is substantial, uncontradicted evidence of a risk to life and torture, access to effective legal recourse should be guaranteed. The author contends that by failing to secure him such effective remedy, the State party breached articles 2 and 14 of the Covenant.

State party's observations on admissibility and merits

4.1 In its submission on the admissibility and merits of the communication transmitted on 21 December 2009, the State party notes that the author has based his communication on precisely the same story, evidence and facts that a competent domestic tribunal and expert risk assessment officer have determined not to be credible, and as not supporting a finding of substantial personal risk of torture or cruel or inhuman treatment in the future.

4.2 The State party contends that the author's allegations with respect to articles 6, paragraph 1, and 7 are inadmissible on the ground of non-exhaustion of domestic remedies and non-substantiation. In particular, the author has submitted an application for consideration of permanent residence on humanitarian and compassionate grounds (H&C), which is an available and effective remedy,[17] and has yet to be decided. In the event that his H&C application is granted, the author will receive permanent resident status. In the event that his application is denied, he will receive reasons for such refusal, and can submit an application for leave to apply for judicial review to the Federal Court. Consequently, the State party requests the Committee to declare the communication inadmissible with respect to allegations presented under articles 6 and 7, for failure to exhaust domestic remedies.

4.3 The State party further submits that the author has not substantiated, on even a *prima facie* basis, his claims with respect to articles 6 and 7 of the Covenant. His assertions are neither credible, nor are they supported by available objective evidence. The State party submits that several pieces of evidence and declarations from the author are so inconsistent as to shed doubts on his credibility. It notes that the fatwa is in Urdu, yet has an English-language signature stamp, and typed English-language footer, with the word "Colony" misspelled as "Calony". According to the State party, it is questionable that the official letterhead of a fundamentalist Muslim group in Pakistan would use an English-language signature, misspelled at that. It further questions a number of allegations made by the author, including his brother's alleged beating and subsequent death, his divorce, the purpose of his travel to Sri Lanka, and the identity of the alleged perpetrators of his brother's beatings, which were on one occasion described by the author in a covering letter (accompanying a picture of his dead brother in a coffin) as "police officers", and on other occasions as "unknown individuals" (in the police report filed by his brother), or as "hooligans" (in a letter from his brother, addressed to the author).

4.4 The State party also noted a contradiction concerning the author's divorce deed, dated 26 October 2007, which provides the author's reasons for seeking divorce as that he found he could no longer maintain a normal matrimonial relationship with his wife. According to the State party, this explanation for the divorce is inconsistent with the author's allegation that his wife was "kidnapped". In addition, the divorce deed submitted by the author was signed by him in Karachi in October 2007, that is, several months after his asylum application was filed in Canada (in February 2007). The author's voluntary return to Pakistan to obtain a divorce indicates that he does not fear persecution, torture, or death there, as he claims. Furthermore, the author has not explained the contradiction between his assertion that his wife and daughter were "kidnapped" in April 2004, and his admission, during his asylum proceedings, that he had attended his daughter's dedication to the church in June 2004.

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[17] The State party refers to the Committee's decision in communication No. 1302/2004, *Khan v. Canada*, decision of inadmissibility adopted on 25 July 2006, para. 5.5.

4.5 There is nothing new to suggest that the author is at personal risk of torture or any ill-treatment in Pakistan. The State party recalls that it is not the role of the Committee to re-evaluate facts and evidence, unless it is manifest that the domestic tribunal's evaluation was arbitrary or amounted to a denial of justice.[18] Regarding the situation in Pakistan, the State party is of the view that the author is not at personal risk,[19] in that he has not submitted any evidence demonstrating that Christians or Christian pastors are at particular risk of torture or death in Pakistan. Incidents of violence against Christians are isolated, not systematic nor systemic. The U.S. Department of State report[20] indicates that most blasphemy allegations are made by Sunni Muslims against other Sunni Muslims. While there have been several cases of blasphemy allegations against Christians, the same source indicates that bail has been granted, and at least one of the accused has been acquitted, indicating that judicial protection is available to Christians accused. In 2005, a law was passed requiring senior police officers to review blasphemy charges and eliminate spurious charges. The report confirms that all religious minorities in Pakistan — Ahmadis, Shias and Hindus, as well as Christians — are targets of discrimination and sporadic violence. Even if human rights abuses against some persons — including Christians — continue to be reported in Pakistan, this is not sufficient by itself to constitute a violation of the Covenant if the author is returned there.

4.6 The State party further submits that the author's allegations concern actions by private actors in Pakistan, as opposed to State authorities, and that the author has failed to establish that Pakistan is unable, or unwilling, to protect him.[21] In conclusion, the State party reiterates that the author has not substantiated that he is at personal risk if returned, and an internal flight alternative is available to him, even if it were to be accepted that he would be in danger in Karachi.

4.7 Regarding the author's allegations under article 2 that he was denied access to an effective remedy, the State party submits that these allegations are incompatible with the provisions of the Covenant, within the meaning of article 3 of the Optional Protocol. The author has criticized the PRRA and H&C procedures, as well as the review process by the Federal Court under article 2 of the Covenant, which cannot be invoked standing alone.[22]

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[18] The State party refers to, inter alia, communication No. 1551/2007, *Tarlue v. Canada*, decision of inadmissibility adopted on 27 March 2009, para. 7.4.

[19] The State party refers to the Committee against Torture's communication No. 119/1998, *V.N.I.M. v. Canada*, decision adopted on 12 November 2002, para. 8.5, in which it determined that, due to the fact that the complainant had not established that he would run a personal risk of being exposed to torture upon return, the Committee had determined that it need not examine the general human rights situation of the country of return.

[20] U.S. Department of State, Country Reports on Human Rights practices – Pakistan – 2008. According to the report, "most complaints were filed against the majority Sunni Muslim community. Many blasphemy complaints were lodged by Sunnis against fellow Sunnis".

[21] The State party refers to communication No. 1302/2004, *Khan v. Canada* (see note 17 above), para. 5.6), in which the Committee found the communication inadmissible, partly on these grounds.

[22] The State party refers, inter alia, to communication No. 1234/2003, *P.K. v. Canada*, decision of inadmissibility adopted on 20 March 2007, para. 7.6.

4.8 With respect to the author's allegations under article 9 of the Covenant, the State party submits that they are incompatible with the provisions of the Covenant, pursuant to article 3 of the Optional Protocol. The State party is of the view that article 9 of the Covenant has no extraterritorial application and does not prohibit a State from deporting a foreign national to a country where he alleges he faces a risk of arbitrary arrest or detention.[23]

4.9 As for the author's allegations brought under article 14 of the Covenant, challenging the refugee determination and post-determination process, the State party is of the view that this issue is beyond the scope of the Committee's review, and should be declared inadmissible *ratione materiae* pursuant to article 3 of the Optional Protocol, as immigration proceedings are not a "suit at law", within the meaning of article 14, as interpreted by the Committee.[24] The State party nonetheless refutes the author's contentions, which it views as devoid of any basis in fact or law. Regarding the PRRA determination, the State party refers to several decisions of the Federal Court, among them *Say v. Canada* (Solicitor General),[25] where the independence of the PRRA decision-makers was considered in detail, and confirmed, on the basis of extensive evidence and argument. Since 2004, and thus at the time of the author's own PRRA application in 2009, the PRRA function has been under the authority of the Minister of Citizenship and Immigration, thereby further reinforcing the Officer's independence.[26]

4.10 In the event that the Committee were to declare part or all of the allegations admissible, the State party requests that the Committee find them without merit.

Author's comments on the State party's observations

5.1 On 10 April 2012, the author rejected the State party's observations. He submits that the State party merely reiterates the conclusions of the Refugee Board and the PRRA determination, which rejected the author's claims solely based on alleged inconsistencies. The author reiterates that he has been denied access to effective recourse, stressing that existing procedures in the State party are not designed to correct errors, and that there is an extreme unwillingness to acknowledge any mistakes made in the asylum process. PRRA Officers are low-level immigration officers working in such a climate of scepticism that they will find that there is no danger for any refused refugee claimant, no matter what new evidence is produced, or the country situation. The author adds that this case highlights the fact that there is no real access to an effective remedy within the State party's appellate system in asylum procedures, with a very narrow judicial review in the process. The Federal Court has raised the threshold for what is an arguable case for the issuance of an order to stay deportation to a level which is permitting flagrant violations of the State party's obligations. The Federal Court will not accept new evidence on judicial review, even if such evidence is of a compelling nature. The PRRA procedure takes an extremely restrictive approach to new evidence, as can be seen from the wording of section 113 of the Immigration and Refugee Protection Act.[27]

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[23] The State party refers to paragraph 3 of the Committee's general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, para. 12, *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 40*, vol. I (A/59/40 (Vol. I)), annex III .

[24] The State party refers to communications No. 1341/2005, *Zundel v. Canada*, decision of inadmissibility adopted on 20 March 2007, para. 6.8, and No. 1234/2003, *P.K. v. Canada* (see note 22 above), paras. 7.4–7.5.

[25] 2005 FC 739.

[26] Prior to 2004, the PRRA function was situated within the Canadian Border Services Agency.

[27] Section 113 reads:

5.2 The author refers to a report of the Committee to Aid Refugees, Amnesty International and Centre justice et foi, submitted to the Immigration Committee of the Canadian Parliament. This report, and the oral submissions presented to Parliament, show strong evidence that instead of the international law test of "substantial risk", the State party's courts impose a standard of "beyond a reasonable doubt" for applicants to meet, when assessing the risk faced. The threshold for review by the Federal Court of PRRA decisions is very high: The Court will only intervene if it finds that the decision was "manifestly unreasonable", which is the highest threshold for review of decisions in administrative law. Thus, there are many situations in which a judge may not have arrived at the same conclusion as the PRRA officer based on the evidence on file, but will still not intervene, because the PRRA decision was not "manifestly unreasonable". According to the above-mentioned report referred to by the author, PRRA agents thus do not have to make the "right" decision; they just have to avoid making "manifestly wrong" ones. The author submits that this is not in conformity with the State party's obligations under article 2 of the Covenant, particularly in cases involving the right to life, or the right to be free from torture. In the present case, the risk faced by the author was not given proper consideration by the State party's authorities.

5.3 While acknowledging the fact that he filed an H&C application in mid-March 2009 which is still pending, the author rejects the State party's contention that domestic remedies were not exhausted, as the renewed H&C application does not protect him from deportation to Pakistan. Also, extensive medical evidence which was submitted as part of the H&C application had already been submitted with his PRRA application, but was not taken into consideration. There is therefore very little prospect of success for this H&C.

5.4 The author rejects the inconsistencies and doubts raised by the State party with regard to a number of pieces of evidence and allegations. There is no reason to question the strong evidence submitted. Referring to the fatwa, whose authenticity was questioned by the State party, the author notes that minor mistakes in English are common in Pakistan, even in official documents. The author acknowledges a mistake in one of the covering letters accompanying his PRRA submission submitted by his counsel, which stated that his brother had been attacked by "police officers",[28] but notes that this does not contradict or diminish the probative value of such evidence, as his brother claimed the police failed to record the names of his aggressors. The author adds that whether his wife left him, or was kidnapped, does not seem entirely material to the case. Regarding the divorce deed, which is specifically addressed by the State party in light of conflicting dates, the author responds that the divorce procedure was organized by his brother when the author was already in Canada. The author merely had to sign all the documents and send them to his brother, who carried out the procedure in Pakistan on his behalf. Everything he has reported regarding the loss of his wife and daughter is very painful to him, and difficult to talk about.

5.5 Regarding the question of an internal flight alternative, the author submits that Islamist fundamentalists are "all across Pakistan", and that there is nowhere in the country where the life of a Christian pastor would be truly safe. There is a legal presumption that if the persecution comes from the State, or from State agents, an internal flight alternative should be deemed to be absent. The author recalls that a police report under the blasphemy

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"Consideration of an application for protection shall be as follows:

(a) an applicant whose claim to refugee protection has been rejected may present only new evidence that arose after the rejection or was not reasonably available, or that the applicant could not reasonably have been expected in the circumstances to have presented, at the time of the rejection;

(b) a hearing may be held if the Minister, on the basis of prescribed factors, is of the opinion that a hearing is required".

[28] See para. 4.3 above.

law was filed against him. The complainant in the case is the same Mullah who issued the fatwa against the author, who is a well-known radical fundamentalist. Consequently, the author would be subjected to arrest and probable torture anywhere in Pakistan. To claim, as the State party does, that he would have an internal flight alternative cannot be considered a serious and reasonable argument in the circumstances.

5.6 The author adds that the objective evidence of danger for Christian leaders is extremely strong and well documented. If anything, the danger has worsened since the author left Pakistan. The author annexes a large number of documents, including press clippings reporting, inter alia, on: the assassination, in Faisalabad, of two Christian brothers, including a pastor, who had been arrested and charged with blasphemy, and were subsequently shot down outside of court; a death sentence and price on the head of a Christian mother of five for "blaspheming against Islam"; the assassination of Punjab Governor Salman Taseer in Islamabad, who was shot by one of his bodyguards because of his opposition to the blasphemy law in Pakistan; and armed attacks against Christians in Karachi by Taliban. On the basis of the evidence presented, the author submits that, clearly, the Pakistani authorities are not offering protection to individuals persecuted on account of their faith, including those facing charges of blasphemy.

5.7 The author reiterates that there is overwhelming evidence as to the personal subjective risk faced, on the basis of his profile and his past, which leads him to maintain that articles 6, 7 and 9 would be violated should he be returned to Pakistan. Pakistan is, clearly, either unwilling or unable to protect Christians. The danger is even greater for a pastor and an evangelist. It is uncontested that the author is a Christian pastor. This was confirmed by several letters from different sources in Sri Lanka, Canada and Pakistan. People accused of blasphemy are often lynched in prison, and not only do the police offer no protection in such cases, but actually assist complainants in bringing this type of blasphemy complaint.

5.8 The author further refers to the independent medical and psychological evidence submitted, recalling that he has been receiving long-term follow-up by a social worker and a doctor, as well as one of the main organizations treating patients suffering from post-traumatic stress disorder.[29] He also testified about his despair and suicidal state after his brother's death, and submitted pictures of his dead brother as part of his application for a stay of his deportation.

Further submission from the State party

6.1 On 18 April 2013, the State party responded to the author's comments. First, it informs the Committee that the author remains in Canada, solely on the basis of the Committee's request for interim measures, with which the State party has complied. The State party reiterates that the complaint is both inadmissible and without merit in its substance, and that a number of inconsistencies were identified as having undermined the author's credibility. In this regard, the State party notes that, contrary to his assertions, the fact of whether his wife left him or was kidnapped is material to the case, since kidnapping is consistent with his allegations of persecution and risk, whereas a marriage breakdown would simply suggest a personal motive for leaving Pakistan, which is unrelated to risk of harm. The State party reiterates the fact that a number of inconsistencies and contradictions were identified in his story concerning the alleged kidnapping, which is of substantial importance in the assessment of his allegations. Furthermore, since the author is alleging that the fatwas purportedly issued against him were at the instigation of "his wife's abductor", whether in fact there was a kidnapping is very relevant to the issue of the existence of the fatwas.

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[29] Réseau d'intervention auprès des personnes ayant subi la violence organisée (RIVO).

6.2 The State party recalls that, in his latest observations, the author has claimed that the divorce was organized by his brother, and that he had signed the documents in Canada and sent them to Pakistan. However, according to the State party, the author's signature on the document was purportedly witnessed by two individuals, he (the author) was purportedly identified by a lawyer based on his (the author's) identity card, and the document is "attested" by a Justice of the Peace. If the author's latest version of events is true, then it indicates that the author falsified a legal document by purporting to sign it in Karachi when in fact he signed it in Canada, and that he had witnesses who participated in this fraud. Either the author was in Karachi at the time, or the divorce deed is evidence of his lack of credibility. The State party concludes that such inconsistencies concerning the central aspect of his story seriously undermine the overall strength of his case.

6.3 The State party rejects the author's statements, under articles 2 and 14 of the Covenant, about aspects of the Canadian refugee determination system. It clarifies that, contrary to the author's assertions, the test for a stay of deportation sought before the Federal Court has been applied since the Court's decision of 1988, *Toth v. Canada (Minister of Employment and Immigration)*,[30] in which the Court established the following test: whether there is a serious issue to be tried; whether there is a risk of irreparable harm if the applicant is deported; and whether the balance of convenience favours the applicant. This same test was applied in the author's application for a stay of removal in June 2009,[31] in which the court determined that the author had not raised a serious issue as to the legality of the PRRA decision, and considered the new evidence in its assessment of whether there was a risk of irreparable harm, and whether the balance of convenience favoured the applicant. The State party further rejects the author's assertion that the burden of proof required to be offered protection in the PRRA process is "beyond a reasonable doubt". It clarifies that, whether the risk is assessed by the Immigration and Refugee Board or by a PRRA Officer, the standard of proof for protection on Refugee Convention grounds is "reasonable chance", and the standard of proof for protection on the grounds of risk of torture or risk to life or of cruel and unusual treatment or punishment is on a "balance of probabilities". The State party further reiterates that it is not the role of the Committee to consider the Canadian immigration and refugee protection system in the abstract. It submits that, to the extent that any of the author's allegations about the deficiencies in the system had a direct bearing on the assessment of his claim for protection, which is denied, they should have been raised before the Federal Court. In the same vein, the State party recalls that the author applied for permanent residence on humanitarian and compassionate grounds ("H&C") in March 2009. To date, no decision on this application has been made.

6.4 Regarding the human rights situation in Pakistan, the State party submits that the U.S. Department of State *International Religious Freedom Report for 2011* indicates that while religiously motivated violence and human rights abuses remain serious problems in Pakistan, there are signs of improvement with respect to the blasphemy laws and religious tolerance. In recent months, it has been reported that senior members of the Pakistan Government, including the interior minister, have spoken out in defence of a young Christian girl facing blasphemy charges. The Pakistani police and Government provided protection for the girl and her family in the months following the accusations. In November 2012, the Islamabad High Court threw out the charges against the girl for lack of evidence, and subsequently filed charges against her accuser for fabricating evidence. According to the State party, these developments suggest that the highest levels of the Pakistani government, as well as the police and the courts, are becoming increasingly sensitive to the misuse of blasphemy allegations. It also reiterates that the blasphemy laws are applied to all other religious minorities in Pakistan, as well as the majority Muslims, and therefore cannot be considered to constitute discrimination against Christians in particular.

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[30] (1988), 86 NR 302 (FCA).

[31] *Masih v. Canada (Minister of Citizenship and Immigration)*, IMM-2867-09 (22 June 2009).

6.5 The State party reiterates that the communication should be deemed inadmissible on the grounds that the author's allegations under articles 6 and 7 of the Covenant are manifestly unfounded; that his allegations of violations of articles 2, 9 and 14 are incompatible with the provisions of the Covenant; and that he has failed to exhaust domestic remedies in respect of the new allegations raised in his reply submission. In the alternative, the State party asks the Committee to find the communication to be wholly without merit.

Issues and proceedings before the Committee

Consideration of admissibility

7.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the case is admissible under the Optional Protocol to the Covenant.

7.2 The Committee has ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

7.3 With respect to the author's allegation that the refugee determination and asylum procedures breached article 14 of the Covenant, as immigration agents lack competence and impartiality, the Committee observes that the author has failed to sufficiently substantiate, for admissibility purposes, that, in his case, the decisions adopted in the framework of his asylum application and related review proceedings did not emanate from competent, independent and impartial tribunals. In these circumstances, the Committee need not determine whether the proceedings relating to the author's deportation fell within the scope of application of article 14 (determination of rights and duties in a suit at law).[32] This part of the communication, accordingly, is inadmissible under article 2 of the Optional Protocol.

7.4 The Committee notes the State party's argument that the author has not exhausted domestic remedies because he filed an H&C application on 18 March 2009, which remains pending. The Committee recalls its jurisprudence to the effect that authors must avail themselves of all judicial remedies in order to fulfil the requirement of article 5, paragraph 2 (b), of the Optional Protocol, insofar as such remedies appear to be effective in the given case, and are de facto available to them.[33] In the present case, the Committee observes that four years after the author's H&C application was filed, it remains unanswered and considers that the delay in responding to the author's application is unreasonable. The Committee further observes that the pending H&C application does not shield the author from deportation to Pakistan, and therefore cannot be described as offering him an effective remedy. Accordingly, the Committee concludes that article 5, paragraph 2 (b), of the Optional Protocol does not preclude it from examining the author's communication.

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[32] See, inter alia, communication No.1315/2004, *Singh v. Canada*, decision of inadmissibility of 30 March 2006, para. 6.2.

[33] See communications No. 1959/2010, *Warsame v. Canada*, Views adopted on 21 July 2011, para. 7.4; No. 1003/2001, *P.L. v. Germany*, decision of inadmissibility of 22 October 2003, para. 6.5; and No. 433/1990, *A.P.A. v. Spain*, decision of inadmissibility of 25 March 1994, para. 6.2.

7.5 The Committee notes the State party's challenge to the admissibility of the communication on the ground of failure on the part of the author to substantiate his claims under articles 6, paragraph 1, and 7 of the Covenant. In light of the extensive evidence submitted, both on the general country situation, and on the author's personal circumstances, the Committee considers that the author has sufficiently substantiated, for purposes of admissibility, that his forcible return to Pakistan would expose him to a risk of being subjected to treatment contrary to articles 6 and 7 of the Covenant. The Committee therefore declares this part of the communication admissible, insofar as it appears to raise issues under these provisions which need to be examined on the merits.

7.6. With regard to the author's claims under article 9, paragraph 1, the Committee notes the State party's argument that this provision has no extraterritorial application and does not prohibit a State from deporting a foreign national to a country where he or she allegedly faces a risk of arbitrary arrest or detention. The Committee takes note of the author's claim that because of the fatwa issued against him, and the First Information Report filed with the police, he would be at risk of arbitrary detention upon return. The Committee considers that, in the context of the present communication, this claim cannot be dissociated from those under articles 6 and 7 of the Covenant.

7.7 The Committee therefore declares the communication admissible, insofar as it appears to raise issues under articles 6, paragraph 1, 7 and 9 of the Covenant, and proceeds to their consideration on the merits.

Consideration of the merits

8.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it, as provided for under article 5, paragraph 1, of the Optional Protocol.

8.2 The Committee recalls the State party's obligation under article 2 of the Covenant to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant, including in the application of its processes for expulsion of non-citizens.

8.3 The Committee notes the author's claim that he faces a real risk of being subjected to treatment contrary to articles 6 and 7 of the Covenant if he were to be forcibly returned to Pakistan, where no State protection would be offered to him. The Committee also takes note of the State party's contention that the author's applications before domestic authorities were rejected on the ground that the author lacked credibility, a conclusion reached further to inconsistencies in his statements and lack of credible evidence in support of his allegations. The Committee also takes note of the State party's argument that the blasphemy laws apply to all religious minorities in Pakistan, as well as to the Muslim majority in the country, and that the author failed to convincingly show that he was unable to obtain protection from the Pakistani authorities.

8.4 Notwithstanding the deference to be given to the immigration authorities in assessing the evidence before them, the Committee must determine whether the author's removal to Pakistan would expose him to a real risk of irreparable harm. In this context, the Committee recalls its general comment No. 31, in which it refers to the obligation of States parties not to extradite, deport, expel or otherwise remove a person from their territory where there are substantial grounds for believing that there is a risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed.[34]

8.5 The Committee finds that, in the circumstances, and notwithstanding the inconsistencies highlighted by the State party, insufficient attention was given to the author's allegations about the real risk he might face if deported to his country of origin. The Committee notes that the State party claims that the author's declarations are not credible and merely expresses doubts about their veracity, without substantiating these allegations. With respect to the fatwa, the State party has failed to undertake any serious examination of its authenticity; the fatwa was not given any weight, solely because it included a signature and footer in English, which also contained an English spelling mistake. No official expert analysis was conducted, nor was any thorough investigation undertaken with regard to the author of the fatwa, his profile, or his authority to issue fatwas. Investigation would have been all the more critical given that it was the author of the fatwa who had filed the First Information Report against the author, registered before the Karachi police on 4 June 2005, with respect to acts regarded by the police as constituting an offence under Pakistani criminal law (blasphemy law), which incurs the death penalty. The Committee also notes that the State party has refrained from providing any comment on the Federal Court's statement, in its decision of 22 June 2009, that it was prepared to accept that the author's brother was beaten to death by unknown individuals. Furthermore, the State party failed to take into account the uncontested medical reports submitted by the author, which point to risks for his mental health in the event of a forcible return to Pakistan.

8.6 The Committee accordingly considers, in the circumstances of the present case, that the expulsion of the author would constitute a violation of article 6, paragraph 1, and article 7 of the Covenant.

8.7 In light of its findings on articles 6, paragraph 1, and 7 of the Covenant, the Committee does not deem it necessary to further examine the author's claims under article 9 of the Covenant.

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the author's removal to Pakistan would violate his rights under articles 6, paragraph 1, and 7 of the Covenant.

10. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including a full reconsideration of his claim regarding the risk of treatment contrary to articles 6, paragraph 1, and 7 of the Covenant should he be returned to Pakistan, taking into account the State party's obligations under the Covenant. The State party is also under an obligation to take steps to prevent similar violations in the future.

11. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give

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[34] General comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant (see note 23 above), para. 12.

effect to the Committee's Views. The State party is also requested to publish the present Views and disseminate them broadly in the official languages of the State party.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Appendices

I. Individual opinion of Committee member Mr. Yuval Shany, joined by Committee members Mr. Cornelis Flinterman, Mr. Walter Kälin, Sir Nigel Rodley, Ms. Anja Seibert-Fohr and Mr. Konstantine Vardzelashvili (dissenting)

1. We are unable to agree with the decision rendered by the Committee to find that the State party's decision to deport the author back to Pakistan amounts to a violation of articles 6, paragraph 1, and 7 of the Covenant for the following reasons.

2. According to the Committee's established jurisprudence, it should accord deference to fact-based assessments by national immigration authorities as to whether removed individuals would face a real risk of a serious human rights violation upon removal, since "it is generally for the instances of the States parties to the Covenant to evaluate facts in such cases".[a] Such an approach is based on acceptance by the Committee of the comparative advantage that domestic authorities have in making factual findings due to their direct access to oral testimonies and other materials presented in legal proceedings at the national level. It is also based on the view that the Committee is not a court of fourth instance that should re-evaluate facts and evidence *de novo*.

3. Consequently, the Committee held in the past that it would regard decisions of local immigration authorities as violating the Covenant where the author was able to point to serious irregularities in the decision-making procedures, or where the final decision was manifestly unreasonable or arbitrary in nature because inadequate consideration was given in domestic proceedings to the specific rights of the author under the Covenant or available evidence not taken properly into account.[b] For example, the Committee found violations of the Covenant where the local authorities failed to consider an important risk factor.[c] It also found violations where the author was able to show on the basis of uncontested evidence that upon removal he would be exposed to a real personal risk of irreparable harm.[d]

4. All the risk factors relied upon by the majority view in the present case — the fatwa issued against the author, the violent death of his brother, and the complaint against him to the local police for violating Pakistani blasphemy laws — were duly considered by the Canadian Immigration Refugee Board and the Pre-Removal Risk Assessment officer, as well as by the Canadian Federal Courts that reviewed their decisions. On the basis of all the information before them, the Canadian authorities came to the conclusion that the author's version of the events that he claimed happened to him in Pakistan before leaving that country lacks credibility and that, in general, Christian pastors in Pakistan are not subject today to a real risk of physical harm.

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[a] Communication No. 1763/2008, *Pillai v. Canada*, Views adopted on 25 March 2011, para. 11.2.

[b] See e.g., communication No. 1544/2007, *Hamida v. Canada*, Views adopted on 18 March 2010, paras. 8.4–8.6

[c] Communication No. 1763/2008, *Pillai v. Canada* (see note 1 above), paras. 11.2 and 11.4 ("The Committee further notes that the diagnosis of Mr. Pillai's post-traumatic stress disorder led the IRB to refrain from questioning him about his earlier alleged torture in detention. The Committee is accordingly of the view that the material before it suggests that insufficient weight was given to the authors' allegations of torture and the real risk they might face if deported to their country of origin, in the light of the documented prevalence of torture in Sri Lanka").

[d] Communication No. 1544/2007, *Hamida v. Canada* (see note 2 above), para. 8.7

5. We are not persuaded by the majority view that the decision of the Canadian authorities demonstrated a serious procedural defect, such as omitting to consider an important risk factor, or was manifestly unreasonable or arbitrary in nature.

6. The author had access to various judicial and administrative instances in Canada, which fully heard and considered his claim of a real risk of irreparable harm upon removal to Pakistan, and he failed to establish that there were any defects in the procedure which should lead us to reject its outcome. Moreover, the version of events provided by the author to the Canadian authorities contained a number of serious contradictions – in particular relating to the kidnapping of his wife and daughter. Therefore, we cannot hold that the sceptical approach taken by the Canadian authorities towards key factual aspects of the author's claim that his personal circumstances are such that he will be at real risk of irreparable harm upon his return to Pakistan was manifestly unreasonable or arbitrary.

7. We also find no grounds in the evidence before us to reject the factual risk assessment made by the Canadian authorities, according to which, in general, Christian pastors in Pakistan are not subject today to a real risk of physical harm. Under these circumstances, in which both the specific and general factual risk factors invoked by the author were thoroughly examined and rejected by legal authorities in the State party, we cannot hold on the basis of the evidence before us that the author proved that upon removal he would be exposed to a real personal risk of irreparable harm.

8. As a result of these considerations, we are of the view that the author has failed to substantiate his claim that the decision of the State party to deport him to Pakistan would violate article 6, paragraph 1, and article 7 of the Covenant and accordingly find no violation of the Covenant by Canada.

[Done in English. Subsequently to be issued also in Arabic, Chinese, French, Russian and Spanish as part of the present report.]

II. Individual opinion of Committee member Mr. Yuji Iwasawa (dissenting)

1. It has long been the constant practice of the Committee in removal proceedings to recall its jurisprudence that "it is generally for the courts of the States parties to the Covenant to evaluate facts and evidence of a particular case, unless it is found that the evaluation was clearly arbitrary or amounted to a denial of justice."[a] Since 2011, the Committee has used the following formula: the States parties have the obligation not to extradite, deport, expel or otherwise remove a person from their territory where there are substantial grounds for believing that there is a real risk of irreparable harm; "generally speaking, it is for the organs of States parties to the Covenant to review or evaluate facts and evidence in order to determine the existence of such risk".[b] This latter formula, even though somewhat different from the former, originates from the same underlying idea. As explained also in the individual opinions of Mr Yuval Shany et al., such a deferential standard of review is predicated upon the Committee's recognition that domestic authorities have comparative advantage in evaluating facts and evidence and that the Committee is not a fourth instance that should re-evaluate facts and evidence *de novo*. The Committee considers decisions of domestic authorities as violating the Covenant where the evaluation was manifestly unreasonable or where there were serious irregularities in the procedures.

2. In the present communication, I am unable to conclude that the material before the Committee demonstrates that the evaluation of facts and evidence carried out by the authorities of the State party was manifestly unreasonable. The domestic authorities identified a number of inconsistencies in the author's claims as having undermined his credibility, including his claim that his wife and daughter had been kidnapped. The majority of the Committee attaches much importance to the fact that the author of the fatwa was the same person who had filed the First Information Report against the author. However, the author alleged that the fatwa had been issued at the instigation of "his wife's abductor", and it was not unreasonable that the domestic authorities considered whether there was in fact a kidnapping as relevant to the existence of the fatwa.

[Done in English. Subsequently to be issued also in Arabic, Chinese, French, Russian and Spanish as part of the present report.]

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[a] Communication No. 1544/2007, *Hamida v. Canada* (see note 2 above), para. 8.4. See also No. 1551/2007, *Tarlue v. Canada* (see note 18 above), para. 7.4; No. 1455/2006, *Kaur v. Canada*, decision of inadmissibility adopted on 30 Oct. 2008, para. 7.3; No. 1540/2007, *Nakrash v. Sweden*, decision of inadmissibility adopted on 30 Oct. 2008, para. 7.3; No. 1494/2006, *A.C. v. The Netherlands*, decision of inadmissibility adopted on 22 July 2008, para. 8.2; No. 1234/2003, *P.K. v Canada*, decision of inadmissibility adopted on 20 March 2007, para. 7.3. For an overview of the standard of review used by the Committee in removal proceedings up to March 2011, see communication No. 1763/2008, *Pillai v. Canada*, Views adopted on 25 March 2011, Individual opinion of Yuji Iwasawa.

[b] Communications No. 2149/2012, *Islam v. Sweden*, Views adopted on 25 July 2013 (posterior to the adoption of the present Views), para. 7.4; No. 1912/2009, *Thuraisamy v. Canada*, Views adopted on 31 Oct. 2012, para. 7.4; No. 1801/2008, *G.K. v. The Netherlands*, Views adopted on 22 March 2012, para. 11.2; No. 1833/2008, *X v. Sweden*, Views adopted on 1 Nov. 2011, para. 9.2; No. 1819/2008, *A.A. v. Canada*, decision of inadmissibility adopted on 31 Oct. 2011, para. 7.8; No. 1763/2008, *Pillai v. Canada*, (see note 1 above), paras. 11.2 and 11.4.

R. Communication No. 1884/2009, *Aouali et al. v. Algeria* (Views adopted on 18 October 2013, 109th session)*

Submitted by:	Mouni Aouali, Feryale Faraoun and Fatiha Bouregba (represented by Track Impunity Always (TRIAL))
Alleged victims:	Farid Faraoun (husband, father and son, respectively, of the authors) and the authors
State party:	Algeria
Date of communication:	19 May 2009 (initial submission)
Subject matter:	Enforced disappearance
Procedural issue:	Exhaustion of domestic remedies
Substantive issues:	Right to life; prohibition of torture and cruel and inhuman treatment; right to liberty and security of person; respect for the inherent dignity of the human person; recognition as a person before the law; right to privacy; right to protection of the family; and right to an effective remedy
Articles of the Covenant:	2 (para. 3), 6 (para. 1), 7, 9 (paras. 1–4), 10 (para. 1), 16, 17 and 23 (para. 1)
Article of the Optional Protocol:	5 (para. 2 (b))

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 18 October 2013,

Having concluded its consideration of communication No. 1884/2008, submitted by Mouni Aouali, Feryale Faraoun and Fatiha Bouregba under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the authors of the communication and the State party,

Adopts the following:

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* The following members of the Committee took part in the consideration of this communication: Mr. Yadh Ben Achour, Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Walter Kälin, Ms. Zonke Zanele Majodina, Mr. Kheshoe Parsad Matadeen, Mr. Gerald L. Neuman, Sir Nigel Rodley, Mr. Victor Manuel Rodríguez-Rescia, Mr. Fabián Omar Salvioli, Ms. Anja Seibert-Fohr, Mr. Yuval Shany, Mr. Konstantine Vardzelashvili and Ms. Margo Waterval.

Pursuant to rule 90 of the Committee's rules of procedure, Mr. Lazhari Bouzid did not participate in the consideration of the communication.

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The authors of the communication are Mouni Aouali (married name Faraoun), an Algerian national born on 2 March 1953; Feryale Faraoun, an Algerian national born on 28 April 1979; and Fatiha Bouregba, an Algerian national born on 14 July 1931. They claim that their husband, father and son, respectively, Farid Faraoun, born on 8 September 1951, is the victim of violations by the State party of articles 2 (para. 3), 6 (para. 1), 7, 9 (paras. 1–4), 10 (para. 1), 16, 17 and 23 (para. 1) of the International Covenant on Civil and Political Rights. They claim to be themselves the victims of violations by the State party of articles 2 (para. 3), 7, 17 and 23 (para. 1) of the Covenant. The authors are represented by counsel.[1]

1.2 On 10 July 2009, in accordance with rule 92 of its rules of procedure, the Committee, through its Special Rapporteur on new communications and interim measures, asked the State party not to take any measure that might hinder the exercise by the authors and members of their family of their right to submit an individual complaint to the Committee. Accordingly, the State party was requested not to invoke its national legislation, and specifically Ordinance No. 06-01 on the implementation of the Charter for Peace and National Reconciliation, against the authors and members of their family.

1.3 On 27 October 2009, the Committee, through its Special Rapporteur on new communications and interim measures, decided not to examine the admissibility of the communication separately from the merits.

The facts as submitted by the authors

2.1 Mr. Farid Faraoun, a farmer who raised cattle in the region of Sidi Bel Abbès, had sent an appeal and request for a hearing to the security chief of the *wilaya* (governorate) of Sidi Bel Abbès in January 1996 to challenge the refusal by the authorities to recognize his election as Chair of the milk producers' association; in his view their refusal was a politically motivated act based on his support for the Front Islamique du Salut at a time when this was a legal organization.

2.2 On 11 February 1997, four criminal investigation officers from the security forces of the *wilaya* of Sidi Bel Abbès, dressed in plain clothes, armed and travelling in official vehicles, searched the Faraoun family home without a warrant. The officers forced the victim to follow them to the police station in his own vehicle. No reasons were given for his arrest. On the evening of his arrest, his wife, Mouni Aouali, learned that the family farm had been completely destroyed in the presence of a gendarmerie brigade (*Darak el Watani*) and with the help of equipment belonging to the municipality of Sidi Bel Abbès.

2.3 On 12 February 1997, criminal investigation officers dressed in plain clothes and travelling in police vehicles arrived at the family home and asked Ms. Aouali and her four children to leave the house. One of the officers told Ms. Aouali to take her papers, money and jewellery. A neighbour and some cousins of the family were then allowed to go into the house to take whatever was strictly necessary. In the presence of the police commissioner of the *wilaya* of Sidi Bel Abbès, they then proceeded to demolish the family home, where the family had lived for more than 17 years. The demolition, using bulldozers belonging to the municipality, was carried out without a court order and took several hours. The family had only their neighbours and friends to rely on for accommodation. With the destruction of Farid Faraoun's farm, the loan the family had taken out could not be repaid and the authors were left with no financial resources.

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[1] The Optional Protocol entered into force for the State party on 12 December 1989.

2.4 During the night of 12 February 1997, Ms. Aouali managed to secretly meet with a soldier who told her that her husband had been tortured on the night of his arrest but was still alive. He advised her to do nothing that might make the situation worse. In the following months, the family received information from various sources claiming that the victim had been injured in the leg and left eye and that he had been seen in the military hospital of Sidi Bel Abbès and then taken to the military hospital in Oran.

2.5 Since the victim's arrest, his family has tried in vain to get information from the authorities and to have an investigation launched. Two days after Farid Faraoun was arrested, Fatiha Bouregba went to the police station, where she was told that her son had been transferred to the town's military sector. When she went to the military sector, she was insulted and threatened with arrest by the sector commander. On 13 July 1997, Farid Faraoun's family asked the President of the National Human Rights Observatory to intervene to find him, but nothing was done in response to this request. On 8 August 1999, the victim's mother went to the *wilaya* of Sidi Bel Abbès to report her son's disappearance, but nothing was done in response. On 4 August 2005 and 8 January 2006, the victim's wife wrote to the Minister of Justice, the Minister of the Interior and the President of the Republic to ask for an investigation into what had happened to him. On 8 August 2005, the Faraoun family tried unsuccessfully to bring the case before the National Advisory Commission for the Promotion and Protection of Human Rights. On 12 August 2006, the victim's mother again denounced her son's disappearance, this time to the gendarmerie brigade of Alger Plage, and was given a "certificate of disappearance following unsuccessful inquiries and searches". Ms. Bouregba refused to accept this, and lodged an appeal with the chief of the aforementioned brigade, asking for a thorough investigation into her son's place of detention. To this day, the Faraoun family has had no news of the victim and no investigation has been opened in response to their efforts.

2.6 The authors say they have taken only limited steps for fear of reprisals. Moreover, after the promulgation on 27 February 2006 of Ordinance No. 06-01 on the implementation of the Charter for Peace and National Reconciliation, the authors found themselves denied the legal right to initiate judicial proceedings. The authors point out that, according to the settled jurisprudence of the Committee, only effective and available remedies need to be exhausted. A remedy is only effective if it offers some prospect of success and if it would allow the authors to obtain satisfaction, and it is only available if the authors have unhindered access to it.

The complaint

3.1 The authors assert that Farid Faraoun is a victim of enforced disappearance, as he was arrested by State officials and his arrest was followed by a refusal to acknowledge that he had been deprived of liberty and by the concealment of his fate. More than 15 years after his disappearance and incommunicado detention, the chances of finding him alive seem remote and, even if his disappearance did not end in his death, the threat to his life would constitute a violation of article 6, read in conjunction with article 2, paragraph 3, of the Covenant.

3.2 The authors point out that, according to the Committee's jurisprudence, the mere fact of being subjected to enforced disappearance constitutes inhuman or degrading treatment. The anguish and suffering caused by the victim's indefinite detention and complete lack of contact with his family and the outside world amount to treatment which is contrary to article 7 of the Covenant. Moreover, according to information received by his family, Farid Faraoun was tortured after his arrest.

3.3 The disappearance of the victim was a painful and distressing experience for the authors, as they had no idea what had happened to him or whether he was really dead, and, if he was, in what circumstances he had died and, if he had been buried, where his grave was. This uncertainty is a source of deep and constant suffering, which constitutes a violation of article 7 of the Covenant, on its own and read in conjunction with article 2, paragraph 3, of the Covenant.

3.4 The authors maintain that the destruction of the family home by the authorities constitutes cruel or inhuman treatment within the meaning of article 7 of the Covenant since the house was demolished with the sole aim of intimidating them and was carried out without a court order, without giving the family time to take their furniture or personal effects out of the house, aside from the strict minimum, and without providing any alternative accommodation. The authors were afraid to complain directly to the local courts as a result of the sector commander's threats of arrest and the particularly harsh intimidation they had suffered at the hands of the criminal investigation officers (eviction, destruction of their house and livelihood).

3.5 The authors recall the Committee's settled jurisprudence whereby any unacknowledged detention of a person constitutes a complete negation of the right to liberty and security guaranteed by article 9 of the Covenant and is an extremely serious violation of this article. The victim's arrest without a warrant on 11 February 1997 and the failure to inform him of the reasons for his arrest constitute a violation of article 9, paragraphs 1 and 2, of the Covenant. Moreover, the State party's legislation limits the period of lawful custody to 48 hours as a rule, 96 hours where the charges concern putting State security at risk, and 12 days where terrorist or subversive acts are concerned. The failure to bring the victim before a competent judicial authority constitutes a violation of article 9, paragraph 3, of the Covenant. As he was held incommunicado, with no possibility of contacting the outside world, the victim was unable to challenge the lawfulness of his detention, or ask a judge to order his release, or even ask a third party to defend him, which entails a violation of article 9, paragraph 4, of the Covenant.

3.6 Prolonged detention in a secret location also infringes the guarantees set out in article 10, paragraph 1, of the Covenant.

3.7 The authors submit that the victim, as a person subjected to enforced disappearance, has been deprived of the capacity to exercise his rights under the Covenant and to have recourse to any possible remedy as a direct consequence of the State's conduct. This should be interpreted as a refusal to recognize the victim as a person before the law, in violation of article 16 of the Covenant.

3.8 The house search and the destruction of the family home constitute illegal interference in the privacy and home of the Faraoun family, in violation of article 17 of the Covenant.

3.9 The enforced disappearance of the victim has destroyed the authors' family life, and the State party has failed in its duty to protect it, thereby violating article 23, paragraph 1, of the Covenant.

3.10 The enforced disappearance has made it impossible for Farid Faraoun to exercise his right to appeal in order to challenge the lawfulness of his detention. The authors have tried everything in their power to discover his fate and have tried all legal means to find him. In the absence of a thorough investigation into the alleged human rights violations, and in the absence of the prosecution, trial and sentencing of those responsible for these violations, the State party has violated article 2, paragraph 3, of the Covenant. Moreover, the failure to take the necessary steps to protect the rights set out in articles 6, 7, 9, 10, 16, 17 and 23 itself constitutes a violation of the rights set out in these articles read in conjunction with article 2, paragraph 3, of the Covenant.

State party's observations

4.1 On 28 August 2009, the State party contested the admissibility of the communication. It is of the view that the communication, which incriminates public officials, or persons acting on behalf of public authorities, in cases of enforced disappearance during the period in question — from 1993 to 1998 — should be considered within the broader context of the sociopolitical situation and should be declared inadmissible. The individual focus in this complaint does not reflect the national sociopolitical and security context in which the alleged events are said to have occurred, and do not reflect reality or the factual diversity of the situations covered by the generic term "enforced disappearance" during the period in question.

4.2 In this respect, and contrary to the theories propounded by international NGOs, which the State party finds to be not very objective, the painful ordeal of terrorism that the State party experienced cannot be seen as a civil war between two opposing camps; rather, it was a crisis that led to the spread of terrorism following calls for civil disobedience. This in turn led to the emergence of a multitude of armed groups engaged in terrorist crimes, acts of subversion, the destruction and sabotage of public infrastructure, and acts of terror targeting the civilian population. In the 1990s, as a result, the State party went through one of the most terrible ordeals of its young life as an independent country. In this context, and in accordance with the Constitution (arts. 87 and 91), precautionary measures were implemented, and the Algerian Government informed the Secretariat of the United Nations of its declaration of a state of emergency, in accordance with article 4, paragraph 3, of the Covenant.

4.3 During this period, terrorist attacks were a daily occurrence in the country; they were carried out by a host of ideologically driven armed groups with little in the way of hierarchy, which severely diminished the ability of the authorities to control the security situation. As a result, there was some confusion in the manner in which a number of operations were carried out among the civilian population, and it was difficult for civilians to distinguish between the actions of terrorist groups and those of the security forces, to whom civilians often attributed enforced disappearances. According to a variety of independent sources, including the press and human rights organizations, the concept of disappearances in Algeria during the period in question covers six possible scenarios, none of which can be blamed on the State. The first scenario concerns persons reported missing by their relatives but who in fact had chosen to go into hiding in order to join an armed group and who instructed their families to report that they had been arrested by the security services, as a way of "covering their tracks" and avoiding being "harassed" by the police. The second scenario concerns persons who were reported missing after their arrest by the security services but who took advantage of their subsequent release to go into hiding. The third scenario concerns persons abducted by armed groups which, because they were not identified or because they had stolen uniforms or identification documents from police officers or soldiers, were mistakenly thought to belong to the armed forces or security services. The fourth scenario concerns persons reported missing who abandoned their families, and sometimes even left the country, to escape from personal problems or family disputes. The fifth scenario concerns persons reported missing by their family but who were in fact wanted terrorists who had been killed and buried in the maquis following factional infighting, doctrinal disputes or arguments over the spoils of war among rival armed groups. The sixth scenario mentioned by the State party concerns persons reported missing who were actually living in Algeria or abroad under a false identity provided by a network of document forgers.

4.4 The State party maintains that it was in view of the diversity and complexity of the situations covered by the general concept of disappearance that the Algerian legislature, following the referendum on the Charter for Peace and National Reconciliation, recommended a comprehensive approach to the issue of disappeared persons, whereby all persons who had disappeared in the context of the "national tragedy" would be cared for, all victims would be offered support to overcome their ordeal and all victims of disappearance and their beneficiaries would be entitled to redress. According to statistics from the Ministry of the Interior, 8,023 cases of disappearance have been reported, 6,774 examined, 5,704 approved for compensation and 934 rejected, with 136 still pending. A total of 371,459,390 Algerian dinars (DA) has been paid out as compensation to all the victims concerned. In addition, a total of DA 1,320,824,683 has been paid out in monthly pensions.

4.5 The State party further argues that not all domestic remedies have been exhausted. It stresses the importance of distinguishing between simple formalities involving the political or administrative authorities, non-judicial remedies pursued through advisory or mediation bodies, and judicial remedies pursued through the relevant courts of justice. The State party observes that, as may be seen from the authors' statements, the complainants have written letters to political and administrative authorities, petitioned advisory or mediation bodies and petitioned representatives of the prosecution service (chief prosecutors and public prosecutors), but have not, strictly speaking, initiated legal action and seen it through to its conclusion by availing themselves of all available remedies of appeal and judicial review. Of all these authorities, only the representatives of the prosecution service are authorized by law to open a preliminary inquiry and refer a case to the investigating judge. In the Algerian legal system, it is the public prosecutor who receives complaints and who, if warranted, institutes criminal proceedings. Nevertheless, in order to protect the rights of victims or their beneficiaries, the Code of Criminal Procedure authorizes the latter to sue for damages by filing a complaint with the investigating judge. In this case, it is the victim, not the prosecutor, who initiates criminal proceedings by bringing the matter before the investigating judge. This remedy, which is provided for in articles 72 and 73 of the Code of Criminal Procedure, was not utilized, despite the fact that it would have enabled the victims to institute criminal proceedings and compel the investigating judge to initiate proceedings, even if the prosecution service had decided otherwise.

4.6 The State party also notes the authors' contention that it is impossible to consider that any effective and available domestic remedies exist in Algeria to which the families of victims of disappearance could have recourse, on account of the adoption by referendum of the Charter for Peace and National Reconciliation and its implementing legislation – in particular, article 45 of Ordinance No. 06-01. On this basis, the authors believed they did not need to bring the matter before the relevant courts, in view of the latter's likely position and findings regarding the application of the Ordinance. However, the authors cannot invoke this Ordinance and its implementing legislation as a pretext for failing to institute the legal proceedings available to them. The State party recalls the Committee's jurisprudence to the effect that a person's subjective belief in, or presumption of, the futility of a remedy does not exempt that person from the requirement to exhaust all domestic remedies.[2]

4.7 The State party then turns its attention to the nature, principles and content of the Charter for Peace and National Reconciliation and its implementing legislation. It maintains that, in accordance with the principle of the inalienability of peace, which has become an international right to peace, the Committee should support and consolidate peace and encourage national reconciliation with a view to strengthening States affected by domestic crises. As part of this effort to achieve national reconciliation, the State party adopted the Charter, and its implementing Ordinance prescribes legal measures for the discontinuance of criminal proceedings and the commutation or remission of sentences for any person who is found guilty of acts of terrorism or who benefits from the provisions of the legislation on civil dissent, except for persons who have committed or been accomplices in mass killings, rapes or bombings in public places. This Ordinance also introduces a procedure for filing an official finding of presumed death, which entitles beneficiaries to receive compensation as victims of the "national tragedy". Social and economic measures have also been put in place, including the provision of employment placement assistance and compensation for all persons considered victims of the "national tragedy". Finally, the Ordinance prescribes political measures, such as a ban on holding political office for any person who exploited religion in the past in a way that contributed to the "national tragedy", and establishes the inadmissibility of any proceedings brought against individuals or groups who are members of any branch of Algeria's defence and security forces for actions undertaken to protect persons and property, safeguard the nation and preserve its institutions.

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[2] The State party cites in particular communications Nos. 210/1986 and 225/1987, *Pratt and Morgan v. Jamaica*, Views adopted on 6 April 1989.

4.8 In addition to the establishment of the fund to compensate all victims of the "national tragedy", the sovereign people of Algeria have, according to the State party, agreed to a process of national reconciliation as the only way to heal the wounds inflicted. The State party insists that the proclamation of the Charter for Peace and National Reconciliation reflects a desire to avoid confrontation in the courts, media outpourings and political score-settling. The State party is therefore of the view that the authors' allegations are covered by the comprehensive domestic settlement mechanism provided for in the Charter.

4.9 The State party asks the Committee to note how similar the facts and situations described by the authors are and to take into account the sociopolitical and security context in which they occurred; to find that the authors failed to exhaust all domestic remedies; to recognize that the authorities of the State party have established a comprehensive domestic mechanism for processing and settling the cases referred to in the communication through measures aimed at achieving peace and national reconciliation that are consistent with the principles of the Charter of the United Nations and subsequent covenants and conventions; to find the communication inadmissible; and to request that the authors seek an alternative remedy.

Authors' comments on the State party's submission

5.1 On 2 October 2012, the authors submitted their comments on the State party's submission. They point out that the State party has recognized the competence of the Committee to consider individual communications. This competence is of a general nature and its exercise by the Committee is not subject to the discretion of the State party. In particular, it is not for the State party to determine whether it is appropriate for the Committee to take up a specific case. That is for the Committee to decide when it considers the communication. The authors consider that the State party's adoption of domestic legislative and administrative measures to support the victims of the "national tragedy" cannot be invoked at the admissibility stage to prevent individuals subject to its jurisdiction from using the procedure provided for under the Optional Protocol. Even though such measures may have an impact on the settlement of a dispute, they must be studied with regard to the merits of the case and not at the admissibility stage. In the present case, the legislative measures adopted amount to a violation of the rights enshrined in the Covenant, as the Committee has previously observed.[3]

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[3] The authors refer to the concluding observations of the Human Rights Committee concerning the third periodic report of Algeria, adopted on 1 November 2007 (CCPR/C/DZA/CO/3), paras. 7, 8 and 13. The authors also refer to communication No. 1588/2007, *Benaziza v. Algeria*, Views adopted on

5.2 The authors recall that Algeria's declaration of the state of emergency on 9 February 1992 does not affect the right of persons to submit individual communications to the Committee. Article 4 of the Covenant allows for derogations from certain provisions of the Covenant during states of emergency, but does not affect the exercise of rights under the Optional Protocol. The authors therefore consider that the State party's observations on the appropriateness of the communication do not constitute a ground for inadmissibility.

5.3 The authors again refer to the State party's argument that the requirement to exhaust domestic remedies requires them to institute criminal proceedings by filing a complaint with the investigating judge, in accordance with articles 72 et seq. of the Code of Criminal Procedure. They refer to an individual communication concerning the State party in which the Committee stated that "the State party has a duty not only to carry out thorough investigations of alleged violations of human rights, particularly enforced disappearances or violations of the right to life, but also to prosecute, try and punish anyone held to be responsible for such violations. To sue for damages for offences as serious as those alleged in the present case cannot be considered a substitute for the charges that should be brought by the public prosecutor".[4] The authors therefore consider that, given the serious nature of the alleged offences, it was the responsibility of the competent authorities to take up the case. However, no action was taken, even though the authors attempted, as soon as Farid Faraoun was arrested, to make enquiries into his whereabouts, but to no avail.

5.4 Two days after her son's arrest, Fatiha Bouregba went to the police station, where she was told that her son had been transferred to the town's military sector: she then went there. She was received by the sector commander, who gave her no information on her son, and in fact was quite threatening. This climate of fear was sustained by the destruction of the family home and close surveillance of Faraoun family members. The authors nevertheless stepped up their search (see paragraph 2.4 above), but to no avail. Thus the authors cannot be accused of not having exhausted all remedies for not bringing the matter before the investigating judge and suing for damages in criminal proceedings in the case of a human rights violation of such a serious nature that the State party should not have ignored it.

5.5 As to the State party's argument that mere "subjective belief or presumption" does not exempt the authors of a communication from the requirement to exhaust all domestic remedies, the authors cite article 45 of Ordinance No. 06-01, whereby legal proceedings may not be brought against individuals or groups who are members of any branch of the defence or security forces. Any person making such a complaint or allegation is liable to a term of imprisonment of 3 to 5 years and a fine of between DA 250,000 and DA 500,000. The State party has therefore not convincingly demonstrated how suing for damages would have enabled the competent courts to receive and investigate complaints, as that would involve violating article 45 of the Ordinance, or how the authors could have been guaranteed immunity from prosecution under article 46 of the Ordinance. As treaty body jurisprudence confirms, a reading of these provisions leads to the conclusion that any complaint regarding the violations suffered by the authors and Farid Faraoun would be not only declared inadmissible, but also treated as a criminal offence. The State party fails to provide an example of any case which, despite the existence of the above-mentioned

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26 July 2010, para. 9.2 and communication No. 1196/2003, *Boucherf v. Algeria*, Views adopted on 30 March 2006, para. 11. The authors further refer to the concluding observations of the Committee against Torture concerning the third periodic report of Algeria, adopted on 13 May 2008 (CAT/C/DZA/CO/3), paras. 11, 13 and 17. Lastly, they refer to general comment No. 29 (2001) on derogations during a state of emergency, para. 1 (*Official Records of the General Assembly, Fifty-Sixth Session, Supplement No. 40*, vol. I (A/56/40 (Vol. I)), annex VI).

[4] *Benaziza v. Algeria*, para. 8.3.

Ordinance, has led to the effective prosecution of the perpetrators of human rights violations in a similar case.

5.6 With respect to the merits of the communication, the authors note that the State party has simply listed the sort of scenarios in which the victims of the "national tragedy" might have disappeared. Such general comments do not refute the allegations made in the present communication. In fact similar comments have been put forward in a number of other cases, which shows the State party's continuing unwillingness to consider such cases individually.

5.7 With regard to the State party's argument that it is entitled to request that the admissibility of the communication be considered separately from the merits, the authors refer to rule 97, paragraph 2, of the rules of procedure, which states that the "working group or special rapporteur may, because of the exceptional nature of the case, request a written reply that relates only to the question of admissibility". Consequently, it is not for the authors of the communication or the State party to take such decisions, which are the sole prerogative of the working group or special rapporteur. The authors consider that the present case is no different from other cases of enforced disappearance, and that admissibility should not be considered separately from the merits.

5.8 The authors recall that the State party is required to "submit to the Committee written explanations or statements that shall relate both to the communication's admissibility and its merits". They also recall the treaty body jurisprudence whereby in the absence of comments by the State party on the merits of the communication, the Committee may base its decision on the information in the file. The allegations submitted by the authors in their communication are corroborated by numerous reports on the security forces' actions at the time, and by the persistent efforts of the victim's family. In view of the State party's involvement in the disappearance of Farid Faraoun, the authors are unable to provide additional information in support of their communication, as that information is entirely in the hands of the State party. The authors also note that the lack of any submissions from the State party regarding the merits of the case is tantamount to the State party's acquiescence that violations were committed.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 The Committee recalls that the decision by the Special Rapporteur to examine the admissibility and the merits jointly (see paragraph 1.3 above) does not preclude their being considered separately by the Committee. The joinder of admissibility and the merits does not mean they must be examined simultaneously. Consequently, before considering any claim contained in a communication, the Committee must decide, in accordance with rule 93 of its rules of procedure, whether the communication is admissible under the Optional Protocol to the Covenant.

6.2 As required under article 5, paragraph 2 (a), of the Optional Protocol, the Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement.

6.3 The Committee notes that, in the State party's view, the authors have not exhausted domestic remedies, since they did not consider the possibility of bringing the matter before the investigating judge and suing for damages in criminal proceedings under articles 72 and 73 of the Code of Criminal Procedure. The Committee notes that, according to the State party, the authors wrote letters to political and administrative authorities but did not actually initiate legal proceedings and see them through to their conclusion by availing themselves of all available remedies of appeal and cassation. The Committee notes the authors' argument that they have taken only limited steps for fear of reprisals and that, after the promulgation on 27 February 2006 of Ordinance No. 06-01 on the implementation of the Charter for Peace and National Reconciliation, the authors found themselves denied the legal right to initiate judicial proceedings. The Committee notes that, despite their fear of reprisals, the authors have made numerous inquiries, including to the competent police brigades, in an effort to shed light on the victim's disappearance, but to no avail.

6.4 The Committee recalls that the State party has a duty not only to carry out thorough investigations of alleged violations of human rights brought to the attention of its authorities, in particular enforced disappearances or violations of the right to life, but also to prosecute, try and punish anyone held to be responsible for such violations.[5] Although Farid Faraoun's family repeatedly contacted the police and political authorities about his disappearance, the State party has failed to conduct a thorough and effective investigation. The State party has also failed to provide sufficient evidence that an effective remedy is available, since Ordinance No. 06-01 of 27 February 2006 continues to be applicable despite the Committee's recommendations that it should be brought into line with the Covenant (CCPR/C/DZA/CO/3, paras. 7, 8 and 13). The Committee recalls that, for a communication to be deemed admissible, the authors must have exhausted only the remedies effective against the alleged violation – in the present case, remedies effective against enforced disappearance. In addition, the Committee considers that to sue for damages for offences as serious as those alleged in the present case cannot be considered a substitute for the charges that should be brought by the public prosecutor.[6] Given the vague wording of articles 45 and 46 of the Ordinance, and in the absence of satisfactory information from the State party about their interpretation and actual enforcement, the authors' fears about the effectiveness of filing a complaint are reasonable. In view of the above, the Committee concludes that article 5, paragraph 2 (b), of the Optional Protocol is not an obstacle to the admissibility of the communication.

6.5 The Committee considers that the authors have sufficiently substantiated their claims insofar as they raise issues under articles 6 (para. 1), 7, 9, 10, 16, 17, 23 (para. 1) and 2 (para. 3) of the Covenant, and proceeds to consider the communication on its merits.

Consideration of the merits

7.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as required under article 5, paragraph 1, of the Optional Protocol.

7.2 In the present communication, the State party has been content to argue that communications incriminating public officials, or persons acting on behalf of public authorities, in cases of enforced disappearance between 1993 and 1998 must be looked at in the broader context of the domestic sociopolitical and security environment that prevailed during a period in which the Government was struggling to combat terrorism. The Committee observes that the Covenant demands that the State party concern itself with the fate of every individual and treat every individual with respect for the dignity that inheres in every human being. It further recalls its jurisprudence[7] to the effect that the State party may not invoke the provisions of the Charter for Peace and National Reconciliation against persons who invoke provisions of the Covenant or who have submitted or may submit communications to the Committee. Ordinance No. 06-01, without the amendments recommended by the Committee, appears to promote impunity and therefore cannot, as it currently stands, be considered compatible with the provisions of the Covenant (CCPR/C/DZA/CO/3, para. 7 a).

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[5] See, inter alia, communication No. 1791/2008, *Boudjemai v. Algeria*, Views adopted on 22 March 2013, para. 7.4.

[6] Ibid.

[7] See, *Boucherf v. Algeria*, para. 11; *Benaziza v. Algeria*, para. 9.2; communication No. 1781/2008, *Berzig v. Algeria*, Views adopted on 31 October 2011, para. 8.2; and *Khirani v. Algeria*, para. 7.2.

7.3 The Committee notes that the State party has not replied to the authors' claims concerning the merits of the case and recalls its jurisprudence,[8] according to which the burden of proof should not rest solely on the author of a communication, especially given that the author and the State party do not always have the same degree of access to evidence and that often only the State party is in possession of the necessary information. It is implicit in article 4, paragraph 2, of the Optional Protocol that the State party has the duty to investigate in good faith all allegations of violations of the Covenant made against it and its representatives and to provide the Committee with the information available to it.[9] In the absence of any explanations from the State party in this respect, due weight must be given to the authors' allegations, provided they have been sufficiently substantiated.

7.4 The Committee notes that, according to the authors, Farid Faraoun was arrested on 11 February 1997 by four criminal investigation officers from the security forces of the *wilaya* of Sidi Bel Abbès, dressed in plain clothes, armed and travelling in official vehicles; that he was arrested without a warrant and taken to the police station in Sidi Bel Abbès; that he has not been seen by his family since then; and that, despite all the family's efforts, the authorities have provided no information on his fate. The Committee recalls that, in cases of enforced disappearance, the deprivation of liberty, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, removes the person from the protection of the law and places his or her life at serious and constant risk, for which the State is accountable. In the case at hand, the Committee notes that the State party has produced no evidence to indicate that it has fulfilled its obligation to protect the life of Farid Faraoun. Therefore the Committee concludes that the State party has failed in its duty to protect the victim's life, in violation of article 6, paragraph 1, of the Covenant.[10]

7.5 The Committee recognizes the degree of suffering involved in being held indefinitely without contact with the outside world. It recalls its general comment No. 20 (1992) on the prohibition of torture or other cruel, inhuman or degrading treatment or punishment,[11] which recommends that States parties should make provision against incommunicado detention. It notes that, in the case in question, Farid Faraoun was arrested by Algerian criminal investigation officers on 11 February 1997, that he has had no contact with his family since then and that, according to information received by the family, he was tortured in the hours after his arrest. In the absence of a satisfactory explanation from the State party, the Committee considers that these events constitute a violation of article 7 of the Covenant in respect of Farid Faraoun.[12]

7.6 The Committee also takes note of the anguish and distress caused to the authors by Farid Faraoun's disappearance. It considers that the facts before it disclose a violation of article 7 of the Covenant in respect of them.[13]

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[8] See, inter alia, *Boudjemai v. Algeria*, para. 8.3.

[9] Ibid.

[10] See, inter alia, *Boudjemai v. Algeria*, para. 8.4.

[11] *Official Records of the General Assembly, Forty-Seventh Session, Supplement No. 40* (A/47/40), annex VI, sect. A.

[12] See, inter alia, *Boudjemai v. Algeria*, para. 8.5.

[13] See, inter alia, *Boudjemai v. Algeria*, para. 8.6.

7.7 In addition, the Committee notes the authors' claim to the effect that the family farm was destroyed by the brigade. As to the family home, the wife of Farid Faraoun and her children were apparently evicted and then watched powerless as the house they had lived in for more than 17 years was demolished and their furniture and personal effects destroyed by bulldozers, by order of State officials. The Committee notes the authors' claim that no alternative housing was provided and that the family was left in dire financial straits. The Committee notes also their claim that these acts were intended to intimidate them and that, just as with the arrest of Farid Faraoun, they did not dare complain directly to the courts at the time for fear of reprisals. The Committee notes that the State party has not refuted these allegations. The Committee recalls its general comment No. 20 (1992), stating that it did not consider it necessary to draw up a list of prohibited acts or to establish sharp distinctions between the different kinds of punishment or treatment; the distinctions depend on the nature, purpose and severity of the treatment applied. The Committee also considered that the prohibition in article 7 relates not only to acts that cause physical pain but also to acts that cause mental suffering to the victim.[14]

7.8 The Committee notes that, in this case, it was the authorities of the State party that destroyed the farm and demolished the family home and everything it contained; that these acts of destruction were ordered without a warrant; that the authors and their family watched powerless for several hours as the family home, in which they had lived for many years, was demolished; and that the family was provided with no alternative housing or means of subsistence. Under the circumstances, the Committee considers this act of destruction to amount to reprisals and intimidation and that the mental suffering it caused constitutes a separate violation of article 7 of the Covenant with respect to Farid Faraoun and the authors.

7.9 With regard to the alleged violations of article 9, the Committee notes the authors' claim that Farid Faraoun was arrested without a warrant; that he was not charged and was not brought before a judicial authority, which would have enabled him to challenge the lawfulness of his detention; and that no official information was given to the authors regarding his fate. In the absence of satisfactory explanations from the State party, the Committee finds a violation of article 9 in respect of Farid Faraoun.[15]

7.10 Regarding the complaint under article 10, paragraph 1, the Committee reiterates that persons deprived of their liberty may not be subjected to any hardship or constraint other than that resulting from the deprivation of liberty and that they must be treated with humanity and respect for their dignity. In view of Farid Faraoun's incommunicado detention and in the absence of information from the State party in this regard, the Committee finds a violation of article 10, paragraph 1, of the Covenant.[16]

7.11 With regard to the alleged violation of article 16, the Committee reiterates its settled jurisprudence, according to which the intentional removal of a person from the protection of the law for a prolonged period of time may constitute a refusal to recognize that person as a person before the law if the victim was in the hands of the State authorities when last seen and if the efforts of his or her relatives to obtain access to potentially effective remedies, including judicial remedies (Covenant, art. 2, para. 3) have been systematically impeded.[17] In the present case, the Committee notes that the State party has not furnished any information on the fate or whereabouts of the disappeared person despite the authors' requests to the State party. The Committee concludes that Farid Faraoun's enforced disappearance on 11 February 1997 denied him the protection of the law and deprived him of his right to recognition as a person before the law, in violation of article 16 of the Covenant.

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[14] General comment No. 20 (1992), paras. 4 and 5.

[15] See, inter alia, *Boudjemai v. Algeria*, para. 8.7.

[16] See general comment No. 21 (1992)) on humane treatment of persons deprived of their liberty, para. 3 (*Official Records of the General Assembly, Forty-Seventh Session, Supplement No. 40* (A/47/40), annex VI, sect. B), and, inter alia, *Boudjemai v. Algeria*, para. 8.8.

[17] See, inter alia, *Boudjemai v. Algeria*, para. 8.9.

7.12 With regard to the alleged violation of article 17 of the Covenant, the Committee notes the authors' claim that criminal investigation officers from Sidi Bel Abbès searched the Faraoun family home without a warrant and that the family farm as well as the family home were completely destroyed, one in the presence of a gendarmerie brigade and the other in the presence of the police commissioner from the *wilaya* of Sidi Bel Abbès. The Committee notes that the State party has made no comment on these claims. In the absence of any explanation from the State party in this respect, due weight must be given to the authors' allegations, provided that they have been sufficiently substantiated.[18] The Committee concludes that the entry of State officials into the home of Farid Faroun and his family in such circumstances, as well as the destruction of their farm and home, constitutes unlawful interference with their privacy, family, and home, in violation of article 17 of the Covenant in respect of Farid Faraoun and the authors.[19]

7.13 In light of the above, the Committee will not consider the claims based on the violation of article 23, paragraph 1, of the Covenant separately.

7.14 The authors invoke article 2, paragraph 3, of the Covenant, which imposes on States parties the obligation to ensure an effective remedy for all persons whose Covenant rights have been violated. The Committee attaches importance to the establishment by States parties of appropriate judicial and administrative mechanisms for addressing claims of rights violations. It refers to its general comment No. 31 (2004), on the nature of the general legal obligation imposed on States parties to the Covenant,[20] according to which the failure by a State party to investigate allegations of violations could in itself give rise to a separate breach of the Covenant. In the present case, the authors contacted the competent authorities regarding Farid Faraoun's disappearance as soon as he was arrested. All their efforts were to no avail, however, and the State party failed to conduct a thorough and effective investigation into his disappearance. Furthermore, the absence of the legal right to initiate judicial proceedings since the promulgation of Ordinance No. 06-01 on the implementation of the Charter for Peace and National Reconciliation continues to deprive Farid Faraoun and the authors of any access to an effective remedy, since the Ordinance prohibits, on pain of imprisonment, the initiation of legal proceedings to shed light on the most serious crimes, such as enforced disappearances (CCPR/C/DZA/CO/3, para. 7). In view of the above, the Committee concludes that the facts before it disclose a violation of article 2 (para. 3), read in conjunction with articles 6 (para. 1), 7, 9, 10, 16 and 17 of the Covenant in respect of Farid Faraoun, and of article 2, paragraph 3, read in conjunction with articles 7 and 17 of the Covenant, in respect of the authors.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the information before it discloses violations by the State party of article 6 (para. 1), article 7, article 9, article 10 (para. 1), article 16, and article 2 (para. 3) read in conjunction with articles 6 (para. 1), 7, 9, 10 (para. 1), 16 and 17 of the Covenant in respect of Farid Faraoun.

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[18] Communication No. 1905/2009, *Khirani v. Algeria*, Views adopted on 26 March 2012, para. 7.3.

[19] See communication No. 1779/2008, *Mezine v. Algeria*, Views adopted on 25 October 2012, para. 8.10.

[20] *Official documents of the General Assembly, Fifty-Ninth Session, Supplement No. 40*, vol. I (A/59/40 (Vol. I)), annex III.

It also finds a violation of articles 7 and 17 and of article 2 (para. 3) read in conjunction with articles 7 and 17 in respect of the authors.

9. In accordance with article 2, paragraph 3, of the Covenant, the State party is under an obligation to provide the authors with an effective remedy, including by: (a) conducting a thorough and effective investigation into the disappearance of Farid Faraoun; (b) providing the authors with detailed information about the results of its investigation; (c) releasing Farid Faraoun immediately if he is still being detained incommunicado; (d) in the event that Farid Faraoun is deceased, handing over his remains to his family; (e) prosecuting, trying and punishing those responsible for the violations committed; and (f) providing adequate compensation to the authors for the violations suffered, and also to Farid Faraoun if he is still alive. Notwithstanding the terms of Ordinance No. 06-01, the State party should ensure that it does not impede enjoyment of the right to an effective remedy for the victims of crimes such as torture, extrajudicial executions and enforced disappearances. The State party is also under an obligation to take steps to prevent similar violations in the future.

10. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether or not there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when a violation has been established, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views and to have them widely disseminated in the official languages of the State party.

[Adopted in English, French and Spanish, the French text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

S. Communication No. 1885/2009, *Horvath v. Australia* (Views adopted on 27 March 2014, 110th session)*

Submitted by:	Corinna Horvath (represented by counsel, Tamar Hopkins)
Alleged victims:	The author
State party:	Australia
Date of communication:	19 August 2008 (initial submission)
Subject matter:	Non-enforcement of judgement providing compensation for police misconduct
Procedural issue:	Non-exhaustion of domestic remedies
Substantive issues:	Right to an effective remedy
Articles of the Covenant:	Articles 2 (para. 3), 7, 9 (paras. 1 and 5), 10 and 17
Article of the Optional Protocol:	Article 5 (para. 2 (b))

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 27 March 2014,

Having concluded its consideration of communication No. 1885/2009, submitted to the Human Rights Committee by Corinna Horvath under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Corinna Horvath, an Australian national. She claims that her rights under articles 2, 7, 9 (paras. 1 and 5), 10 and 17 were violated by Australia. The author is represented by counsel.

The facts as submitted by the author

2.1 On 9 March 1996, around 9.40 p.m., two police officers, constables J. and D., arrived at the author's house in Summerville, State of Victoria, to inspect the author's car for evidence that it had been recently driven. The constables had issued an unroadworthy certificate the previous day. The author, who was then aged 21, did not allow the police to remain on the premises as they had no warrant, and she and her companion, C.L., used force to make them leave. The police officers called for reinforcements and, at about 10.30

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* The following members of the Committee participated in the examination of the present communication: Mr. Yadh Ben Achour, Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Walter Kälin, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Gerald L. Neuman, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabián Omar Salvioli, Mr. Marat Sarsembayev, Mr. Krister Thelin and Ms. Margo Waterval.

p.m., eight officers arrived at the house stating that they intended to arrest the author and C.L. for having attacked constables J. and D. on their first visit and that they did not need a warrant for that.

2.2 Constable J. kicked the front door open and in so doing, struck on the face D.K., one of a group of friends who were also present, causing him injury. Then, Constable J. brought D.K. to the floor, struck him on the right side of the head and hit him with a baton across his lower back. Constable J. then pulled the author to the floor and punched her in the face. With the assistance of another policeman, Constable J. rolled the author over and, despite her bleeding nose, handcuffed her, dragged her out to the police van and took her to the police station at Hastings.

2.3 The author suffered a fractured nose and other facial injuries, including bruising and a chipped tooth. She also had some bruising, scratches and abrasions to other parts of her body. The police officers handcuffed the author in a manner that prevented her from reducing the pain and blood flow from her nose or otherwise relieving her injuries. At the police station, she was not provided with immediate medical treatment. Instead, she was left screaming in pain in the cell. She was eventually discovered by a police doctor who contacted her parents, who arranged to have her taken by ambulance to Frankston Hospital. A week later, she was readmitted to hospital for five days in relation to her nose injury. After some months, she recovered from her physical injuries but was left with some scars on her nose and a possible aggravation of hay fever. She also suffered from anxiety and depression, for which she received treatment.

2.4 On 6 June 1997, the author and three other plaintiffs filed proceedings for damages against four police officers individually, and against the State of Victoria under section 123 of the Police Regulation Act 1958 (Victoria), before the County Court of Victoria. On 23 February 2001, Judge Williams of the County Court held that, with regard to the author, Constable J. was liable for assault and malicious prosecution; Sergeant C. was liable for negligence; and all four officers were jointly liable for trespass, wrongful arrest and false imprisonment. The officers were also held to be liable for various similar claims with regard to C.L. and the two remaining plaintiffs.

2.5 Judge Williams ordered the following damages awards: (a) $A 120,000 for negligence against Sergeant C., transferred to the State; (b) $A 90,000 for assault, against Constable J.; (c) $A 30,000 for trespass, wrongful arrest and false imprisonment, against all the defendants, transferred to the State; and (d) $A 30,000 for malicious prosecution, against Constable J. alone. The officers were also held liable for various similar claims in relation to C.L. and the two remaining plaintiffs.[1]

2.6 On 9 April 2001, the State of Victoria filed an appeal against Judge Williams' decision regarding its liability for damages. On 7 November 2002, the Court of Appeal overturned Judge Williams' decision that the State was liable to pay for damages arising from the intentional actions of Constable J. and the negligence of Sergeant C. The Court found that the latter's negligence was not a cause of the injuries to the author, but rather that they were caused by intentional actions that in effect severed the causal chain of liability of Sergeant C. As a consequence, the liability of the officers remained, but the liability of the State to pay damages was overturned. The author was awarded damages totalling $A 143,525. With respect to the claim against the State of Victoria, the author sought leave to appeal against the judgement of the Court of Appeal in the High Court of Australia, which was refused on 18 June 2004.

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[1] See para. 4.8.

2.7 The author filed a complaint to the Ethical Standards Department of Victoria Police. As a result, disciplinary proceedings were launched, but they were subsequently dropped for lack of evidence, despite the strong factual findings against the police officers recorded during the court proceedings outlined above. The author had no standing in the proceedings and was not called as a witness. On 4 August 2004, she made a complaint to the Police Ombudsman which was then transferred to the Office of Police Integrity.

2.8 At the time the author submitted the communication to the Committee, the situation in respect of compensation was as follows: (a) she had not received any damages from the individual police officers; (b) she had not received costs to pay her legal team; and (c) the State of Victoria continued to maintain a legal landscape that absolved its liability to compensate victims of intentional human rights abuses. The situation in respect of disciplinary matters was as follows: (a) all or most of the police involved in the incident remained employed by the State of Victoria, with no disciplinary or criminal action having been successfully taken against any of them, despite Judge Williams' findings of serious misconduct. None of the occupants of the house was consulted by police investigators from the Ethical Standards Department; and (b) the legal system of Victoria does not ensure effective discipline or prosecution of police engaged in human rights abuses.

2.9 Constable J. brought charges against the author for assault against police and traffic infringements, which were dismissed by the Magistrates' Court in Frankston on 9 November 1996. In his judgement of 23 February 2001, Judge Williams found that Constable J. had conducted a prosecution for assault against the author that was not based upon a proper motive, but arose from a mixture of ill-will and a desire to justify ex post facto the general conduct of the police throughout the whole affair. On that basis, Judge Williams found that the tort of malicious prosecution had been committed.

The complaint

Article 2

3.1 The author claims that the State party violated article 2, paragraph 3, of the Covenant, as it did not provide her with an effective remedy. She received no compensation and no disciplinary action was taken against the perpetrators of the assault.

3.2 There is no statutory scheme in Victoria that provides adequate compensation for human rights abuses. Under common law, the State is not responsible for police conduct because when police act on the basis of a power under law, they act independently, not as agents of the State. Section 123 of the Police Regulation Act 1958 remedies that situation only partially by holding the State liable only where police act reasonably in good faith.[2] Moreover, the Act creates an exceptionally narrow class of State liability for actions or omissions of police officers. In order for the State to be liable, the actions of the police must be negligent, yet the police must also be acting in good faith, and the act or omission must be "necessarily or reasonably done" in the course of their duty. It is very difficult to imagine a case that satisfies those criteria. In the present case, the trial judge was satisfied that the negligent planning and supervision of the raid by Sergeant C. was a reasonable yet negligent action done in good faith, and that the abuse suffered by the author flowed from that negligence. However, the Court of Appeal overturned that analysis, holding that the actions of the police during the raid effectively severed the causal chain. The Court of Appeal found that there was a "common design" agreed between the officers to commit intentional torts that outweighed any negligence of Sergeant C. in planning the raid.

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[2] Section 123 reads:

"Immunity of members

(1) A member of the force … is not personally liable for anything necessarily or reasonably done or omitted to be done in good faith in the course of his or her duty as a member of the force or police recruit.

(2) Any liability resulting from an act or omission that, but for subsection (1), would attach to a member of the force or police recruit, attaches instead to the State.

(3) This section applies to acts or omissions occurring before as well as after the commencement of this section."

3.3 Four states in Australia ensure state compensation for victims of police tort even when police actions are intentional or in bad faith. In two of them, the state will pay punitive damages awarded against officers.

3.4 The State party has failed to ensure that the perpetrators are tried before a criminal court. As a result of their status as police officers, they were not brought before a court as any other perpetrator of similar abuse would have been. Furthermore, the State permitted the officers involved to continue occupying positions in which their unacceptable behaviour could be repeated.

Article 7

3.5 The author claims that she was subjected to cruel, inhuman and degrading treatment during the raid. The degradation was enhanced by her being handcuffed, taken into custody and later charged. Her arrest was cruel and unjustified.

3.6 The level of force used against the author during the raid went far beyond the force required to detain her and was not necessary. The trial judge found that Constable J. "pulled her to the floor and began 'brutally and unnecessarily' to punch her in the face, thereby fracturing her nose and rendering her senseless. In the result, Horvath had no recollection of J.'s assault on her. With the assistance of S., J. then rolled Horvath over and, despite her bleeding nose, handcuffed her and then dragged her out to the van".[3]

3.7 Article 7 imposes two obligations on States parties: a substantive (or negative) obligation to prevent violations and a procedural (or positive) obligation to provide an effective investigation into allegations of substantive violations. In the present case, the investigation was carried out by the Ethical Standards Department, a unit within the Victoria Police. The Victoria Police disciplinary system was criticized in a 2007 report of the Office of Police Integrity entitled "A fair and effective Victoria Police disciplinary system". The author's case is mentioned in that report in a manner which makes it clear that the failure of the disciplinary process to hold police accountable is of concern.

3.8 The County Court of Victoria came to clear findings of fault against the police. Despite the fact that the standards of proof in civil and disciplinary proceedings are the same, the disciplinary process failed to achieve the same result. Owing to the failure to investigate the case effectively or use the findings in the civil proceedings as evidence to remove the police perpetrators from duty, the perpetrators remained employed and were not subjected to any form of discipline. That inaction condones a violation of article 7 and effectively authorizes further potential violation of article 7.

Article 9 (paras. 1 and 5)

3.9 The author was subjected to arbitrary arrest and detention, in violation of article 9, paragraph 1, of the Covenant. Without a warrant, the police had no right to enter the author's house and arrest her. The detention was not justified or lawful. Judge Williams found that she had been falsely arrested and imprisoned. Furthermore, the State party did not grant her an enforceable right to compensation, which entails a violation of article 9, paragraph 5.

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[3] Details concerning the author's injuries and psychological consequences are contained in the judgement of the County Court of Victoria.

Article 10

3.10 The assault, constraint by handcuffing, arrest, detention and delay in medical treatment suffered by the author were inhumane and a violation of article 10, in addition to article 7. Her detention in a situation in which medical attention was required added to the trauma she experienced.

Article 17

3.11 In the absence of a warrant or a reason to believe that the author had committed a serious indictable offence, the police invasion of the author's house constituted arbitrary and unlawful interference with her home, family and privacy. Furthermore, the malicious prosecution of the author for assaulting Constable J. was an unlawful attack on her honour and reputation and a disproportionate action which could not be justified by any interpretation of a pressing social need.

Exhaustion of domestic remedies

3.12 The author claims that she exhausted domestic remedies in attempting to claim damages from the State of Victoria. She learned through her lawyer that the individual police officers against whom judgement was entered did not have the resources to pay the judgement amount and cost or any substantial portion thereof. Furthermore, the author cannot obtain compensation through the Victims of Crime Compensation Tribunal, since the acts to which she was subjected were non-criminal.

3.13 Section 123 of the Police Regulation Act 1958 provides no effective remedy for victims of police abuse, even when the abuse is the result of misconduct during police operations and procedures. Victims of police abuse in Victoria are reliant on damages being paid by the individual perpetrators. That is problematic because police officers organize their assets in ways that shield them from potential liability to civil actions. In cases where the individual police officer has no capacity to pay or has no assets in his/her name, the victim is not compensated. That is neither an effective compensation scheme, nor does it provide any incentive to the Victoria Police to prevent further abuses.

Remedies sought

3.14 The author seeks: (a) to be awarded compensation, assessed according to the standards applicable under Australian domestic law; (b) that the State party be directed to enact legislation allowing for compensation by the State party for the illegal activities of police officers; (c) that the State party be directed to ensure that people have genuine access to civil action alleging police abuse and receive assistance in that regard, in order to ensure that civil actions have a systemic impact on reform within police agencies; and (d) that the State party be directed to introduce reforms to the current disciplinary procedures applicable to police officers in the State of Victoria to ensure that: (i) all police who are found civilly liable for human rights abuses are disciplined and removed from the force; (ii) the State party prosecutes police who have committed criminal offences; and (iii) police not subject to civil proceedings are investigated and subject to proceedings that can result in their removal from duty where appropriate.

Observations of the State party on admissibility and on the merits

4.1 The State party submitted its observations on 24 March 2010.

Claims under article 2

4.2 The State party contends that the author failed to substantiate her claim of a violation of article 2. In particular, she failed to substantiate her claim that the four members of the Victoria Police against whom judgement was made did not have the resources to pay the damages awarded and did not have any assets in their names. Furthermore, domestic legal avenues are available to the author to determine whether her assertion is correct. The Rules of the Supreme Court of Victoria set out a process for discovery in aid of enforcement. The Court may, on application by a person entitled to enforce a judgement, order a person bound by the judgement to attend court, be orally examined on material questions, and produce any document or thing in the possession, custody or power of the person relating to the material questions. There is no evidence that the author sought such an order.

4.3 Even if the four members of the police do not have the resources to pay or assets in their names, domestic avenues remain available to the author to recover all or part of the judgement debt. A judgement for the payment of money made in the Supreme Court of Victoria, which includes the Court of Appeal, may be enforced by a number of means, including warrant of seizure and sale, attachment of debts, attachment of earnings, a charging order against the property of the debtor and, in certain circumstances, committal for trial and sequestration (seizure of property). In particular, the Supreme Court Rules provide that a judgement creditor may apply to the Court for an attachment of earnings order. The effect of such an order is that the judgement debtor's employer must pay a reasonable proportion of the debtor's earnings to the creditor. The author is also entitled to apply to the Court of Appeal for an order that the judgement debt be paid by instalments. The author has made no attempt to recover the judgement debt, whether by an order for an attachment of earnings or otherwise.

4.4 In 2003, about six months after the Court of Appeal judgement against Constable J. was entered, he voluntarily chose to become bankrupt. The author has not provided information as to what contact, if any, she had with the trustee appointed to administer Constable J.'s estate in order to ensure that her interests were taken into account in the administration process. Constable J.'s bankruptcy was discharged at the expiry of three years. The author did not seek to enforce the judgement against him following the discharge of his bankruptcy in July 2006.

4.5 According to a document submitted by the author, she learned in 2007 that her lawyer had not taken any steps to recover the judgement debt. Although the author instructed her lawyers in 2008 to take bankruptcy proceedings against the remaining police officers, the bankruptcy register shows no record of any creditor's petition issued in relation to the individual police officers.

4.6 The author has not pursued compensation from the Victims of Crime Assistance Tribunal or its predecessor, the Crimes Compensation Tribunal, despite being eligible to make an application for compensation up to $A 60,000. The absence of a criminal prosecution in respect of the acts of the individual police officers does not preclude application to the Tribunal. The author has therefore failed to exhaust domestic remedies on that basis as well.

4.7 The State party contends that the author's claims under article 2 are without merits. In Australia, the common law rule set out in *Enever v. The King* provides that a "police officer is himself responsible for unjustifiable acts done in the intended exercise of his lawful authority". The liability for such acts is not transferred to the state. Section 123 (1) of the Police Regulation Act 1958 modifies the common law position, providing that a police officer "is not personally liable for anything necessarily or reasonably done or omitted to be done in good faith in the course of his or her duty". Under section 123 (2), liability for such an act or omission attaches instead to the State of Victoria. The outcome is a compensatory scheme whereby, in the event of any unlawful act or omission by a police officer, either the state or the individual police officer will be held liable. That scheme balances an appropriate level of protection and the need to ensure that there is no encouragement to develop an attitude of irresponsibility among police officers. It ensures that there is no scope for impunity and that compensation will be awarded where appropriate. Individual liability has an important deterrent effect. The function of awards of exemplary, aggravated or punitive damages would be undermined if they were simply to be transferred to the state. Consequently, the state's refusal to indemnify acts or omissions of police officers that fall outside the scope of section 123 is consistent with article 2.

4.8 The outcome of the decision of the Court of Appeal of Victoria was that the individual police officers were personally liable to pay damages for assault, trespass, false imprisonment and malicious prosecution. The damages awarded to the author included compensatory damages, aggravated damages and exemplary damages totalling $A 143,525. Of that amount, she was awarded $A 93,525 for the assault against her by Constable J; $A 30,000 for trespass and false imprisonment by all the defendant officers; and $A 20,000 for malicious prosecution against her by Constable J. Hence, the author's right to adequate and effective reparation has been realized. The State party does not accept that the author has successfully proved that she faced difficulties in enforcing the judgement made in her favour, as judicial processes for enforcement are available to her. In any event, a breach of article 2 cannot depend on whether the individual police officers against whom judgement was made have the resources to pay or have assets in their names.

4.9 Regarding the author's claim that the State party breached article 2 by failing to criminally prosecute those allegedly responsible for violating her rights, the State party recalls the Committee's jurisprudence that the Covenant does not provide a right for an individual to require that the State party criminally prosecute another person. Further, the State party has effective legal processes in place to address any alleged violations of inhuman or degrading treatment or punishment by police officers, and those processes have been adequately invoked in the present case.

4.10 The Police Regulation Act 1958 establishes a disciplinary process which is overseen by the Chief Commissioner of Police and undertaken by the Ethical Standards Department of Victoria Police. The Department is responsible for investigating police misconduct and corruption and dealing with service delivery and disciplinary issues. It deals with claims in a prompt and impartial manner. Since November 2004, the Office of Police Integrity has been the independent body that detects, investigates and prevents police corruption and serious misconduct. Furthermore, criminal sanctions are available for conduct constituting serious violations of human rights. The statutory requirement that the Deputy Ombudsman (Police Complaints) be informed of disciplinary investigations provides an important independent check on the adequacy and appropriateness of the disciplinary process.

4.11 As a result of a complaint filed by the author on 21 March 1996, preliminary investigations were undertaken. The Ethical Standards Department informed the author about the status of the investigations on several occasions. When the file was opened, the Department also informed the author that she could make an additional complaint to the Deputy Ombudsman (Police Complaints). The Deputy Ombudsman responded on 30 April 1997 that the time taken to arrange medical treatment for the author was not unreasonable and that the proposal to charge Sergeant C. and Constable J. with disciplinary offences was appropriate in the circumstances. As a result of the preliminary investigation, Constable J. was charged with disgraceful conduct and Sergeant C. with being negligent in the discharge of his duty. An inquiry for Constable J. was conducted on 25 August 1998 and for Sergeant C. on 31 August 1998. As the hearing officer could not reasonably be satisfied on the evidence before him, all charges were dismissed. In respect of the inquiry for Constable J., the hearing officer also noted inconsistencies in the evidence provided by civilian witnesses. At the time the inquiries were concluded, the civil proceedings had not concluded and no findings of fact had been made by the trial judge which could have been considered by the hearing officer. That outcome does not undermine the adequacy of the process to respond to complaints of alleged police misconduct. It is the general practice of the Committee not to question the evaluation of the evidence made in domestic processes.

4.12 The disparity between the findings of the trial judge and the outcome of the disciplinary proceeding can be explained by reference to the different standards of proof which apply in each forum. In disciplinary proceedings involving allegations of serious misconduct, the usual civil standard requiring proof on the balance of probabilities applies, but is increased by an additional requirement that the degree of certainty required must be particularly high given the gravity of the consequences which flow from an adverse finding. That standard is consistent with the serious nature of such proceedings and the punishment, including dismissal, which can result.

Claims under article 7

4.13 Based on the author's failure to make use of all judicial and administrative avenues that offer her a reasonable prospect of redress, the State party submits that the author failed to exhaust domestic remedies. If the Committee finds that the claim under article 7 is admissible, the State party submits that the allegations are without merit.

4.14 The author's treatment did not amount to cruel, inhuman or degrading treatment or punishment. The State party accepts that a conclusion that the treatment was unacceptable or inappropriate is open on the facts, particularly in light of the Court of Appeal's decision to uphold the award of damages to the author for assault and false imprisonment. Nevertheless, her treatment during the incident did not amount to a breach of article 7. For treatment in the context of an arrest to be degrading, there must be an exacerbating factor beyond the usual incidents of arrest. Since arrest, like detention, contains an inherent aspect of humiliation, an element of reprehensibleness must also be present for it to qualify as a violation of article 7. Any exacerbating factor or element of reprehensibleness in the author's purported arrest or detention was insufficient to meet the threshold level of severity required for a breach of article 7. Furthermore, the author has not substantiated the claim that she suffered ongoing adverse physical or mental effects.

4.15 Failure to provide necessary medical attention can, in certain circumstances, amount to a breach of article 7. However, in the present case police records confirm that the author received appropriate and timely medical treatment while in custody. She was treated by a doctor within 20 minutes of arriving at the police station, at 11.00 p.m. on 9 March 1996. At midnight, an ambulance arrived and the author was administered further treatment. She was released from custody at 12.20 a.m. on 10 March 1996 and conveyed to hospital by ambulance. She was readmitted to hospital approximately one week later in relation to her nose injury. There is nothing to suggest that she received anything other than appropriate and timely medical treatment while in detention. On 30 April 1997, the Deputy Ombudsman observed that the time taken to arrange medical treatment for the author was not unreasonable.

4.16 The author claims that the failure to effectively investigate and discipline police involved in the raid condones violations of article 7 and effectively authorizes further potential violations. However, that claim overlaps with her claim under article 2 and should be considered in conjunction with it. States have an obligation to ensure that complaints made in relation to article 7 are investigated promptly and impartially by competent authorities. In the present case, the successful civil action against members of the police demonstrates that individuals remain liable for their acts and omissions. If, as the author proposes, civil liability for all acts and omissions of police officers were to be transferred to the state, it would effectively absolve individuals of their potential individual civil liability. That liability acts as an important deterrent to police officers.

Claim under article 9, paragraph 1

4.17 The State party argues that domestic remedies have not been exhausted and that the claim is without merit. The author's purported arrest and detention should not be characterized as unlawful or arbitrary in the context of article 9, paragraph 1. As was recognized by the Court of Appeal of Victoria, the members of Victoria Police involved in the raid were of the opinion that they had authority to enter the premises and arrest the author under section 459A of the Crimes Act 1958 (Victoria).

Claim under article 10

4.18 The State party argues that domestic remedies have not been exhausted and that the claim is without merit. Further, the author does not clearly identify which treatment is alleged to fall within the scope of article 10.

4.19 The principle that treatment prohibited by the Covenant under article 7 must entail elements beyond the mere fact of deprivation of liberty is also relevant to article 10. Any element of humiliation that may have accompanied the handcuffing and detention was insufficient to meet the threshold required to establish a breach of article 10. Following her arrest, the author was brought directly to the police station, where her handcuffs were removed. Handcuffing, in the context of what was considered to be a lawful arrest, and in the context of her clear non-cooperation with police, was not unreasonable in the circumstances. The author's alleged inability to reduce the pain and blood flow from her nose or otherwise relieve her injuries was insufficient to reach the level of humiliation or debasement prohibited by article 10. Consequently, the purported arrest, handcuffing and detention cannot in themselves amount to a breach of article 10.

4.20 As to the alleged delay in medical treatment, the State party submits that the author's treatment in detention did not breach article 10. Police records confirm that the author received prompt medical treatment while in custody. There was no medical advice to indicate that she should not be detained. The nature of her injuries and the short period of detention are relevant considerations in that regard. The author was briefly admitted to hospital within hours of her arrest and was subsequently discharged. She did not spend a significant period in hospital until almost a week after the incident, indicating that the treatment she required was not urgent.

Claim under article 17

4.21 The State party argues that domestic remedies have not been exhausted and that the claim is without merit. The State party reiterates its arguments in connection with article 9 of the Covenant and submits that the author has presented no evidence to suggest that her honour and reputation were maliciously attacked. To the extent that the charges against her may have been prosecuted without reasonable cause and maliciously, she was successful in her claim for malicious prosecution against Constable J.

Author's comments on the State party's observations

5.1 On 2 July 2010, the author submitted comments on the State party's observations. The author reiterates her allegations and states that she has exhausted all avenues in seeking to recover the judgement debt.

5.2 Once the judgements became enforceable against the individual police officers, letters of demand were forwarded to them seeking payment of the amounts owed to the author. In response, the police officers' counsel informed the author's counsel that

Constable J. had declared himself bankrupt and therefore the author was prevented, under the provisions of the Bankruptcy Act, from pursuing any further action against him. As for the remaining defendants, they had minimal assets, according to the research undertaken by the author's counsel. Under Australian law, superannuation is not accessible in a bankruptcy. Therefore, effectively, if any of the defendants were declared bankrupt, they would have no assets which would be distributable to the author and the other plaintiffs. A warrant of seizure and sale, or a charging order against a property of a debtor is only of benefit if there are assets which can be seized or property which can be charged. The author's counsel, having obtained information from the defendants and carried out his own searches, was of the view that any application to issue a warrant or a charging order would be futile and result in no monies being available. Accordingly, the author's counsel opted to attempt to negotiate a settlement. As a result, the non-bankrupt defendants offered a final settlement of $A 45,000, payable to the author and her three co-plaintiffs. That settlement was accepted. Constable J. was obliged to notify the Trustee in Bankruptcy of the money owed to the author. As no communication was received from the Trustee, it was apparent that no funds were available for distribution to the creditors.

5.3 Regarding the State party's observation that the author could have pursued a claim for compensation in the Victims of Crime Assistance Tribunal, she states that the Tribunal does not provide compensation for pain and suffering and focuses on timely and practical measures to assist victims of crime. The Tribunal may award amounts as financial assistance and special financial assistance. Financial assistance is granted for medical and counselling expenses, loss of earnings and damage to clothes during an act of violence. Special financial assistance may be seen as compensatory in nature. The Tribunal awards modest amounts when an applicant suffers any significant adverse effect as a direct result of an act of violence. It uses categories of offences to determine the maximum level of special financial assistance to be awarded. It is possible that in the author's case, if she did not establish that she had suffered a very serious injury, she would be eligible for financial assistance of either $A 130–$A 650 or $A 650–$A 1,300, which are the amounts awarded for offences that result in serious injury and assault respectively. The awards are symbolic and are not intended to reflect the level of compensation to which victims of crime may be entitled under common law or otherwise. An extendable time limit of two years applies to claims before the Tribunal. The presumption is that an application concerning the present communication would be inadmissible, since the incident occurred in 1996.

5.4 Furthermore, the Tribunal does not make any findings of guilt. Its investigative powers are limited to establishing whether an act of violence occurred and whether the application for financial assistance should be granted to meet expenses related to that act. It does not have the capacity to remedy the breaches outlined in the present communication. Accordingly, an award from the Tribunal is not an effective remedy for the author. To comply with the requirement to exhaust domestic remedies an author must access those remedies which are available and effective in redressing the wrong. Such remedies must also provide the State with an opportunity to respond to and remedy the issue within its jurisdiction.

5.5 The author disagrees with the State party's arguments regarding the individual responsibility of perpetrators. It is the State's responsibility to ensure that its police do not violate human rights and to remedy violations when they occur. By directly compensating victims, the State ensures that its obligations in that respect are fulfilled. Such a position does not relieve the individual perpetrators of liability in civil proceedings. It is also possible for the State to pursue the individual perpetrators for reimbursement. Currently, the practical effect of section 123 of the Police Regulation Act is to absolve the State of responsibility for police who act in bad faith, unreasonably and outside the course of their duty. In the light of that, the State of Victoria is obliged to change its domestic laws, as other states have already done. Furthermore, police violence occurs in part owing to systemic failures in training, oversight and disciplinary measures. State liability for the actions of its agents ensures that such systemic failures are addressed.

5.6 Regarding the State party's observations on the effectiveness of the disciplinary system in Victoria, the author argues that the Ethical Standards Department lacks practical independence and that findings of criminal or torturous conduct against police are rare. She claims that she was not called to give evidence in the hearing of the disciplinary charge against Constable J. and nor were any of the civilian witnesses. The hearing occurred two years after the incident and the investigation took 11 months. Such a delay is inexcusable.

5.7 The author requested a copy of the disciplinary file related to her case, but it was denied to her on the grounds that it would divert too much of the State's resources. The only publicly released information about the process was contained in a brief paragraph in the Office of Police Integrity report entitled "A fair and effective Victoria Police disciplinary system". There was no public scrutiny of the investigation, the hearing or the decision, and no appeal mechanism was open to the author. As for the role of the Deputy Ombudsman as a safeguard of the process, the author claims that mere notification was all that was required and that there is no supervision as such.

5.8 The State party's reference to the standard of proof to explain the difference in outcomes between the disciplinary and the civil proceedings is unjustified and unsupported. It does not address the fact that the disciplinary hearing failed to adduce viva voce evidence from civilian witnesses to the police misconduct, which reflects a systemic and serious failure of the process in circumstances where it was purported that there was insufficient evidence to make a finding of misconduct. The difference in outcomes between the two processes lies in the lack of adequacy, transparency, accountability and independence of the disciplinary hearing process.

5.9 Once the civil proceedings had concluded that the police had lied on matters of major significance, there was the opportunity to reopen or recommence disciplinary proceedings and refer a prosecution brief to the Office of Public Prosecutions. The State failed to pursue those avenues.

5.10 The author reiterates that the treatment to which she was subjected breached article 7 of the Covenant. She was 21 at the time and the treatment was premeditated and intended to punish and intimidate her. She was repeatedly punched, causing very serious and cruel suffering in the form of a broken nose, facial injuries, bruising to her face and other parts of her body, a chipped tooth, loss of consciousness, fear, anguish, distress, intimidation and ongoing psychological conditions. The assault continued while she was helpless and unconscious. The treatment was unnecessarily prolonged by the arrest and transport to the police station, where she continued to be handcuffed. According to Judge Williams, the police viewed the author with "extraordinary bigotry and bias", describing her as a "filthy, dirty, drug-affected female". That provides support for her claim that the intention was to debase, degrade and punish her.

5.11 Regarding the State party's observations with respect to article 9, the author reiterates that the police entry into the house was inappropriate, unjust and unreasonable. It was also unlawful, as stated by Judge Williams. The police could have utilized less invasive ways to effect an arrest if it was truly necessary, such as obtaining a warrant or conducting static observations of the premises. Even if the entry to the premises was believed to be lawful by individual police officers, it does not mean that what occurred after entry was lawful. The assault and transportation to the police station were not proportionate in the circumstances.

5.12 If the Committee considers that there was no breach of article 9, including paragraph 5, the author submits that those actions violated her freedom of movement under article 12 of the Covenant.

5.13 The author reiterates her claims under article 17. She states that a malicious prosecution by necessity breached her right to privacy and not to be subjected to unlawful attacks on her reputation.

Additional observations from the State party

6.1 In August 2011, the State party submitted further observations on admissibility and on the merits. With respect to compensation under the Victims of Crime Assistance Scheme, the State party argues that at the time of the incidents in question, the author would have been entitled to make a claim under the Criminal Injuries Compensation Act 1983 (Victoria) and to compensation of up to $A 50,000, including an award of compensation for pain and suffering of up to $A 20,000. The categories of special financial assistance relied upon by the author did not come into force until 2000. Awards made under the Scheme serve similar purposes to public law damages available in other jurisdictions, in terms of both compensation and vindication.

6.2 Compensation under the Victims of Crime Assistance Act 1996 is an effective remedy for the purposes of article 2. The author remains eligible to pursue such compensation. As she has not done so, she has failed to exhaust all available domestic remedies.

6.3 In jurisdictions that have a separate public law cause of action for breach of human rights, public law damages may serve the objectives of compensating the claimant for loss and suffering caused by the breach, vindicating the right in question by emphasizing its importance and the gravity of the breach and deterring State agents from committing future breaches. Damages are generally not awarded unless one or more of those objectives is served. Where damages are appropriate, the concern is to restore the claimant to the position in which she would have been had the breach not been committed.

6.4 The State party rejects the author's claim that only full payment of compensatory damages, aggravated damages, exemplary damages and full legal costs by the State of Victoria will constitute an "effective remedy". Section 123 of the Police Regulation Act means that the State of Victoria will be liable for breaches of human rights by individual police officers where those breaches occur in accordance with practices and procedures promulgated by Victoria Police or in circumstances in which the conduct is contributed to by systemic issues such as inadequate training, policies and procedures. It is only when a police officer acts well outside the authorized policies and procedures, such that Victoria Police and the State of Victoria cannot be said to have contributed in any way to the conduct, that the State of Victoria will not be liable for the breach.

6.5 Regarding the claims under article 12, the State party submits that the author has failed to exhaust domestic remedies for the reasons specified above, and that the claim is without merits. The right to liberty and freedom of movement are distinct concepts. While restrictions not amounting to a breach of the right to liberty may in some circumstances amount to a breach of freedom of movement, that will not always be the case. The facts of the current case do not give rise to issues regarding liberty of movement as contemplated in article 12. Even if that was the case, any restriction on the author's liberty of movement was within the scope of restrictions permitted under article 12, paragraph 3.

6.6 Section 459A of the Crimes Act 1958 (Victoria) provides that a police officer may enter and search premises for the purpose of arresting a person where the officer believes, on reasonable grounds, that the person has committed a serious indictable offence. Entry, search and arrest in those circumstances are actions provided for by law and necessary to protect national security, public order and the rights and freedoms of others.

6.7 As was recognized by the Court of Appeal, the police officers believed that they had the authority to enter the premises and arrest the author under section 459A. While the

Court of Appeal ultimately found that the entry and arrest were unlawful, the belief of the police officers should be taken into consideration in assessing their actions.

Issues and proceedings before the Committee

Consideration of admissibility

7.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the case is admissible under the Optional Protocol to the Covenant.

7.2 The Committee has ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

7.3 The author claims that the treatment to which she was subjected in connection with the incidents that occurred on 9 March 1996 and subsequent events violated her rights under articles 7, 9 (paras. 1 and 5), 10 (para. 1) and 17 of the Covenant. The Committee notes that the essence of the claims made by the author before the Committee is based on the same grounds as those she brought before the national judicial authorities. In that regard, the County Court of Victoria established the liability of the police officers who raided her house for trespass, assault, wrongful arrest, false imprisonment, malicious prosecution and negligence. The Court of Appeal found that the individual police officers were liable to pay damages for assault, trespass, false imprisonment and malicious prosecution. The Committee considers that, in addressing the substance of the author's claims, the domestic courts acknowledged that the author's rights had been violated and established the perpetrators' civil responsibility for acts which fall under the scope of the above-mentioned provisions of the Covenant. In view of the acknowledgement by the domestic courts of the civil responsibility of State agents for domestic law violations which are covered by articles 7, 9 (para. 1) and 17 of the Covenant, and their liability to pay damages, the Committee considers that the real issue before it is whether the author obtained an effective remedy for the violations of her rights under the Covenant, after the final decision of the domestic courts became enforceable.

7.4 The Committee notes the author's claims under article 2 that she did not receive full compensation, as established by the national courts, and that no criminal and disciplinary actions were taken against the perpetrators of the assault. The Committee also notes the State party's challenge to the admissibility of the communication on the ground that domestic remedies were not exhausted, as the author did not seek the enforcement of the judgement in her favour, in application of the Rules of the Supreme Court of Victoria regarding the process for discovery in aid of enforcement, following the discharge of Constable J.'s bankruptcy. The State party also claims that the author did not pursue compensation from the Victims of Crime Assistance Tribunal. The Committee further notes the information provided by the author regarding the steps taken to seek the enforcement of the judgement and the final settlement that she and her co-plaintiffs felt obliged to accept. The Committee notes the author's argument that the awards provided by the Victims of Crime Assistance Tribunal are symbolic and are not intended to reflect the level of compensation to which victims of crime may be entitled under common law or otherwise.

7.5 The Committee considers that, in choosing to file proceedings for damages against the police officers under the Crown Proceedings Act, the author sought an appropriate avenue of redress, as demonstrated inter alia by the fact that she was successful in her judicial claims and that compensation was awarded to her under the Act. The fact that the judgement of the Court of Appeal was not fully enforced, despite the efforts she undertook subsequently in that respect, is not attributable to the author. Accordingly, for the purpose of admissibility, it cannot be expected that, in addition to those proceedings, the author would seek compensation from the Victims of Crime Assistance Tribunal. The Committee therefore concludes that domestic remedies have been exhausted.

7.6 As the Committee does not see any other obstacle to admissibility, it decides that the communication is admissible insofar as it appears to raise issues under articles 7, 9 (para. 1), 10 (para. 1) and 17 of the Covenant on their own and read together with article 2 (para. 3); and under article 9 (para. 5) on its own.

Consideration of the merits

8.1 The Human Rights Committee has considered the communication in the light of all the information made available to it by the parties, as provided for under article 5, paragraph 1, of the Optional Protocol.

8.2 The Committee notes the author's claims that the State party failed to ensure that the perpetrators be tried before a criminal court and that her complaints before the disciplinary bodies of the Victoria Police were unsuccessful. In that connection, the Committee considers that article 2, paragraph 3, of the Covenant does not impose on States parties any particular form of remedy and that the Covenant does not provide a right for individuals to require that the State criminally prosecute a third party.[4] However, article 2, paragraph 3 does impose on States parties the obligation to investigate allegations of violations promptly, thoroughly and effectively through independent and impartial bodies.[5] Furthermore, in deciding whether the victim of a violation of the Covenant has obtained adequate reparation, the Committee can take into consideration the availability and effectiveness not just of one particular remedy but the cumulative effect of several remedies of a different nature, such as criminal, civil, administrative or disciplinary remedies.

8.3 In the present case, the disciplinary claims before the Police Department were dismissed for lack of evidence. In that respect, the Committee notes the author's allegations, uncontested by the State party, that neither the author nor the other civilian witnesses were called to give evidence; that the author was refused access to the file; that there was no public hearing; and that once the finding was made in the civil proceeding, there was no opportunity to reopen or recommence disciplinary proceedings. In view of those shortcomings and given the nature of the deciding body, the Committee considers that the State party failed to show that the disciplinary proceedings met the requirements of an effective remedy under article 2, paragraph 3, of the Covenant.

8.4 The Committee further notes that the author was successful in her civil suit and that compensation was ordered by the national judicial bodies with reference to the police officers' liability in relation to trespass, assault, wrongful arrest, false imprisonment, malicious prosecution and negligence – unlawful acts of which she was found to be a victim. However, her efforts to seek the enforcement of the final judgement were unsuccessful. In the end, the author was left with no other option but to accept a final settlement involving a quantum which represented a small portion of the quantum granted to her in court.

8.5 With reference to section 123 of the Police Regulation Act (Victoria), the Committee notes that the provision limits the responsibility of the State for wrongful acts committed by its agents without providing for an alternative mechanism for full compensation for violations of the Covenant by State agents. Under those circumstances, the Committee considers that section 123 is incompatible with article 2, paragraph 2, and with article 2, paragraph 3, of the Covenant, as a State cannot elude its responsibility for violations of the Covenant committed by its own agents. In that respect, the Committee recalls that article 2, paragraph 2, requires States parties to take the necessary steps to give effect to the Covenant rights in the domestic order, and to make such changes to domestic laws and practices as are necessary to ensure their conformity with the Covenant.[6] The Committee also recalls that under article 2, paragraph 3, States parties are required to make reparation to individuals whose Covenant rights have been violated. Without such reparation the obligation to provide an effective remedy, which is central to the efficacy of article 2, paragraph 3, is not discharged. In addition to the explicit reparation required by articles 9, paragraph 5, and 14, paragraph 6, the Committee considers that the Covenant generally entails appropriate compensation.[7]

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[4] Communication No. 563/1993, *Bautista de Arellana v. Colombia*, Views adopted on 27 October 1995, para. 8.6.

[5] General comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, para. 15.

8.6 The Committee further considers that actions for damages in domestic courts may provide an effective remedy in cases of alleged unlawfulness or negligence by State agents. It recalls that the obligation of States under article 2, paragraph 3, encompasses not only the obligation to provide an effective remedy, but also the obligation to ensure that the competent authorities enforce such remedies when granted. That obligation, enshrined in article 2, paragraph 3 (c), means that State authorities have the burden to enforce judgements of domestic courts which provide effective remedies to victims. In order to ensure that, States parties should use all appropriate means and organize their legal systems in such a way as to guarantee the enforcement of remedies in a manner that is consistent with their obligations under the Covenant.

8.7 In the present case, the success of the author in obtaining compensation in her civil claim has been nullified by the impossibility of having the judgement of the Court of Appeal adequately enforced, owing to factual and legal obstacles. The procedure established in the domestic law of the State party to remedy the violation of the author's rights under articles 7, 9, paragraph 1, and 17 of the Covenant proved to be ineffective and the compensatory award finally proposed to the author was inadequate, in view of the acts complained of, to satisfy the requirements of an effective reparation under article 2, paragraph 3, of the Covenant. The Committee considers that in situations where the execution of a final judgement becomes impossible in view of the circumstances of the case, other legal avenues should be available in order for the State to comply with its obligation to provide adequate redress to a victim. However, in the present case the State party has not shown that such alternative avenues existed or were effective. The State party refers to compensation under the Victims of Crime Assistance Scheme, but the Committee is not convinced that, given the nature of the Scheme, including its no-fault attributes, the author could indeed obtain adequate redress through it for serious harm inflicted by State agents. The Committee notes in that respect that the State party has not provided information about cases in which persons with claims similar to those of the author obtained adequate redress through the Scheme.

8.8 In view of the foregoing, including the shortcomings regarding the disciplinary proceedings, the Committee considers that the facts before it reveal a violation of article 2, paragraph 3, in connection with articles 7, 9, paragraph 1, and 17 of the Covenant. In view of that finding, the Committee will not consider whether the circumstances of the case constitute a separate violation of articles 7, 9, paragraph 1, and 17. Neither will it consider whether there was a violation of article 10, paragraph 1, on its own and read together with article 2, paragraph 3; and of article 9, paragraph 5.

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[6] General comment No. 31, para. 13.

[7] General comment No. 31, para. 16.

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the State party has violated the author's rights under article 2, paragraph 3, in connection with articles 7, 9, paragraphs 1 and 5, 10, paragraph 1, and 17 of the Covenant.

10. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including adequate compensation. The State party is also under an obligation to take steps to prevent similar violations in the future. In that connection, the State party should review its legislation to ensure its conformity with the requirements of the Covenant.

11. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether or not there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure for all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when a violation has been established, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views and disseminate them widely in the State party.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Appendices

I. Individual opinion by Committee member Anja Seibert-Fohr, joined by Committee members Yuji Iwasawa and Walter Kälin (partly dissenting)

1. The main issue of the present case is the State party's failure to recognize its responsibility for the violent police misconduct. On 9 March 1996, as established by the Country Court of Victoria, the author was tackled by a police officer who pulled her to the floor and began to brutally punch her face rendering her senseless and leaving her with a badly beaten and broken nose. She was rolled over and handcuffed despite her bleeding nose and dragged to a van. Although the County Court established the individual police officer's civil liability on those grounds, the State party continues to deny responsibility for cruel, inhuman or degrading treatment. We regret that the majority of the Committee decided not to consider that important aspect of the case and instead characterized the remedies available to the author as the real issue. To our minds, given the gravity of the ill-treatment and the State party's denial of responsibility, it was indispensable for the Committee to find that the police officer's acts, which were clearly attributable to the State party, amounted to a violation of article 7. Such a finding also would have provided the necessary precondition for the Committee's analysis of the author's compensation claim under article 2, paragraph 3, which does not provide for an independent, free-standing right.

2. We concur that the violation of article 7 was insufficiently remedied because the author neither received any payment for the ill-treatment inflicted on her by Constable J., nor was her ill-treatment subject to an independent official investigation to which she had access. The procedure established under domestic law thus did not provide the author with an effective remedy as required under article 2, paragraph 3 (a), of the Covenant. The Committee's reference to subparagraph (c), however, is misleading as it was not the failure to enforce a judicial remedy but the failure to provide for an effective remedy in the first place which led to a violation of article 2. We emphasize that aspect because without that clarification, the Committee's reasoning might be understood as granting a right to have domestic civil remedies effectuated even to the extent that they go beyond the requirements of article 2, paragraph 3 (a), such as by providing for punitive damages. That is not what article 2 requires and therefore the Committee's conclusion that the State party is under an obligation to provide the author with an effective remedy, including adequate compensation, should be read on the basis of an understanding which is informed by an autonomous interpretation of article 2.

3. We disagree with the Committee's finding that section 123 of the Police Regulation Act 1958 (Victoria), which provides that the State incurs responsibility for a specific category of police misconduct, is incompatible with article 2. In fact, the damage award ordered by the County Court initially had been transferred to the State on the basis of that Act. The failure to provide for an effective remedy did not result from that provision, but from the subsequent application of common law to the case by the Court of Appeal in combination with the State party's failure to establish the availability of an alternative remedy for cases in which individual officers lack the means to pay compensation. We emphasize that point in order to highlight the particularity of the present case and to avoid misunderstandings which could give rise to an overly broad interpretation of the Committee's views.

[Done in English. Subsequently to be issued also in Arabic, Chinese, French, Russian and Spanish as part of the present report.]

II. Individual opinion by Committee member Gerald L. Neuman (partly dissenting)

1. I agree in substance with the dissenting opinion of my fellow Committee members. I write very briefly to note a few other aspects of the Committee's Views with which I cannot concur.

2. The majority View cuts too many corners in dealing with the issues that do not relate to the brutal attack by Constable J. that violated article 7. It treats most of the claims as a unit, although they are different in their character and in their factual bases, and it does not give sufficient consideration to the author's settlement with the other three officers.

3. Moreover, it would be wrong to suggest that the State party has refused to "enforce" a judgement of its domestic courts. The tort judgement, granting damages in magnitudes that exceed the requirements of the Covenant, ran only against the individual officers by its own terms. The majority more appropriately shifts in paragraph 8.7 to the subject of "alternative avenues" by which the State party would provide the author adequate compensation from public funds, which was definitely not what the court's judgement entailed.

4. My concern about the majority's expression of its reasons extends beyond the present case. The overly generalized way in which the majority discusses the issues obscures significant distinctions among violations for which different remedial responses may be sufficient and may have been sufficient in the present case. The Committee should engage in more nuanced discussion of obligations under article 2, paragraph 3, in the future.

5. Unfortunately, my ability to address those issues here is impaired by the fact that the United Nations has insisted upon imposing a word limit on the Committee's Views for budgetary reasons. That practice is antithetical to the Committee's carrying out of its responsibilities, and should be abolished.

[Done in English. Subsequently to be issued also in Arabic, Chinese, French, Russian and Spanish as part of the present report.]

T. Communication No. 1889/2009 *Marouf v. Algeria* (Views adopted on 21 March 2014, 110th session)[*]

Submitted by:	Khaoukha Marouf (represented by Track Impunity Always (TRIAL))
Alleged victims:	Abdelkrim Azizi (the author's husband), Abdessamad Azizi (the author's son) and the author herself
State party:	Algeria
Date of communication:	30 January 2009 (initial submission)
Subject matter:	Enforced disappearance
Procedural issue:	Exhaustion of domestic remedies
Substantive issues:	Right to life, prohibition of torture and cruel or inhuman treatment, right to liberty and security of person, respect for the inherent dignity of the human person, recognition as a person before the law, right to an effective remedy, right to privacy and right to protection of family life
Articles of the Covenant:	Articles 2 (para. 3), 6 (para. 1), 7, 9 (paras. 1–4), 10 (para. 1), 16, 17 and 23 (para. 1)
Article of the Optional Protocol:	Article 5 (para. 2 (b))

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 21 March 2014,

Having concluded its consideration of communication No. 1889/2009, submitted to the Human Rights Committee by Khaoukha Marouf under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The author of the communication, which is dated 30 January 2009 and 28 April 2009, is Khaoukha Marouf, an Algerian national born on 8 March 1943. She claims that her husband, Abdelkrim Azizi, born on 25 March 1941, and her son, Abdessamad Azizi, born on 20 August 1976, were the victims of violations by the State party of articles 2 (para. 3),

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[*] The following members of the Committee participated in the examination of the present communication: Mr. Yadh Ben Achour, Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Walter Kälin, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Gerald L. Neuman, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabián Omar Salvioli, Mr. Marat Sarsembayev, Mr. Krister Thelin and Ms. Margo Waterval.

6 (para. 1), 7, 9 (paras. 1–4), 10 (para. 1), 16, 17 and 23 (para. 1), of the Covenant. She also claims that she herself is the victim of violations by the State party of articles 2 (para. 3), 7, 17 and 23 (para. 1), of the Covenant. She is represented by the organization Track Impunity Always (TRIAL).

1.2 On 19 October 2009, the Committee, through the Special Rapporteur on new communications and interim measures, decided not to consider the admissibility and the merits of the communication separately.

The facts as submitted by the author

2.1 On 22 September 1994, during the night, uniformed police officers who were part of the fifth mobile criminal investigation brigade of the Cité de la Montagne police station in Bourouba broke down the front door of the author's home. When her husband, Abdelkrim Azizi, asked who they were and what they wanted, they insulted and shoved him. They then blindfolded him and took him into the bathroom. While the author and her three daughters were kept in the living room, one of the author's sons, Abdessamad Azizi, then 18 years of age, was led away from the family apartment by the police and has not been seen since. A police officer then took the eldest and then the youngest of the sisters into another room and asked them questions about their family and about their father's activities, while slapping and kicking them. They were then taken into the bathroom, where their father was tortured using the "rag technique".[1] The police officers also tried to rip off Abdelkrim Azizi's beard after dousing it with strong glue. The two sisters in turn saw their father lying on the ground, covered in blood, in a pool of water. The police then went down to the family's storeroom and seized jewellery, money, foodstuffs and identity papers. After threatening to burn down the author's home if she told anyone what had happened that night, the police officers left, taking Abdelkrim Azizi with them. The family has not seen the author's husband or son since then. Following these events, the family's home was searched several times. During these searches, the police officers seized jewellery, money, valuables and food.

2.2 Since the arrests of Abdelkrim and Abdessamad Azizi, the Azizi family has made unceasing attempts to locate the victims. On 23 September 1994, the morning after their arrest, the author went to the Cité de la Montagne police station in Bourouba, where she recognized the police officers who had come to her home the night before. The police officers threatened her but denied having arrested her son and her husband. Despite repeated visits to the police station in Bourouba, the Algiers central police station, El Harrach prison and Serkadji prison, the author was not able to obtain any official information about the fate of her husband or her son. The author has also written several times to the public prosecutor of the Court of El Harrach. As she did not receive any reply, she then wrote to the chief prosecutor of the Court of Algiers, to no effect. The author also made enquiries through a lawyer with the Court of El Harrach, also without success. In December 1996, the author contacted the Algerian League for the Defence of Human Rights and the National Observatory for Human Rights, again with no result.

2.3 On 12 December 1997, the author submitted the case to the United Nations Working Group on Enforced or Involuntary Disappearances. The State party did not reply to the Working Group's requests for information.

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[1] The rag technique consists of forcing the victim to swallow large quantities of dirty water or chemicals through a rag forced into the victim's mouth with the aim of causing suffocation or loss of consciousness.

2.4 According to testimony from the former deputy brigade chief of the Cité de la Montagne police station in Bourouba, Mr. Mohamed Rebai, as published[2] in an open letter dated 1 July 2000 and annexed to the author's communication, the two victims had been at the police station but no specific charges had been brought against them. Mr. Rebai also alleges that the two victims were killed under torture by police commissioner Boualem. Several persons who had been detained at the police station and subsequently released have claimed that they saw the victims there. Abdelkrim Azizi also reportedly passed through the Ain-Nadja military hospital on an unknown date before being brought to Bourouba.

2.5 With regard to the exhaustion of domestic remedies, the author stresses that all her efforts and those of her family members have been to no avail. Despite her submission, the competent prosecutor never followed up on her complaint and the chief prosecutor did not initiate a judicial inquiry. The author claims that she also sent letters on several occasions to the authorities, including the Ombudsman, asking them to open an investigation. The Ombudsman replied to the author on 10 and 13 January 1998, and then on 4 May 1998, acknowledging receipt of her requests for intervention and informing her that he had referred the case to the competent bodies for examination. Since then, he has not provided any information about the follow-up given to his request to the "competent bodies". The authorities have not contacted the author since then. Moreover, she has not received any reply to the letters she sent to the National Observatory for Human Rights, the local public prosecutor of the court of El Harrach or the chief prosecutor of the Algiers Court of Appeal. None of these bodies has contacted the author to inform her that an investigation has been opened. Thus, despite the fact that the members of the Azizi family have appealed to several institutions and national authorities that are in a position to help them, each time they have met with inaction on their part. Not only did the police officers and military personnel who were contacted deny the facts and fail to provide the author with information, they also mocked and threatened her.

2.6 In addition, the author claims that the measures she has taken have been restricted by her fear of further reprisals at the hands of the police and the justice system, considering that one of her sons, Lakhdar Azizi, was detained since 1993 in Berrouaghia prison after having been sentenced to 10 years' imprisonment; the husband of one of her daughters, Kamel Rakik, disappeared after being arrested by security forces on 6 May 1996; her other daughter's husband, Ali Aouis, was also arrested and tortured in May 1996; and the author and her three daughters and young son, then 12 years of age, were arrested and held in unspeakable conditions for 5 weeks in May 1996.

2.7 In the alternative, the author maintains that she no longer has the legal right to bring judicial proceedings since the promulgation on 27 February 2006 of Ordinance No. 06-01 implementing the Charter for Peace and National Reconciliation.[3] Such a remedy would even have been dangerous for the author. Not only did all the remedies attempted prove ineffective, they have now also become totally unavailable. The author therefore maintains that she is no longer obliged to keep pursuing her attempts at the domestic level, which would expose her to criminal prosecution, in order to ensure that her communication is admissible before the Committee.

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[2] Available at: http://www.algeria-watch.org/farticle/justice/taiwanlettre.htm.

[3] The author notes that article 45 of the Ordinance, promulgated on 27 February 2006, provides that "legal proceedings may not be brought against individuals or groups who are members of any branch of the defence and security forces of the Republic for actions undertaken to protect persons and property, safeguard the nation and preserve the institutions of the People's Democratic Republic of Algeria. Any allegation or complaint shall be declared inadmissible by the competent judicial authority". Article 46 of Ordinance No. 06-01 provides that "anyone who, through his or her spoken or written statements or any other act, uses or makes use of the wounds caused by the national tragedy to undermine the institutions of the People's Democratic Republic of Algeria, weaken the State, impugn the honour of its agents who served it with dignity, or tarnish the image of Algeria abroad shall be liable to a term of imprisonment of 3 to 5 years or a fine of 250,000 to 500,000 Algerian dinars". See also Human Rights Committee, concluding observations on the third periodic report of Algeria, CCPR/C/DZA/CO/3/CRP.1, 1 November 2007, paras. 7 and 8.

The complaint

3.1 The author considers that her husband and her son have been the victims of enforced disappearance,[4] in violation of articles 6 (para. 1), 7, 9 (paras. 1–4), 10 (para. 1), 16, 17 and 23 (para. 1) of the Covenant, read alone and in conjunction with article 2 (para. 3) of the Covenant. The author also considers that she herself is the victim of a violation of articles 7, 17 and 23 (para. 1), read alone and in conjunction with article 2 (para. 3) of the Covenant.

3.2 The author argues that her husband, Abdelkrim Azizi, and her son, Abdessamad Azizi, are victims of enforced disappearance, as they were arrested by agents of the State and their arrest was followed by a refusal to acknowledge their deprivation of liberty or to disclose their fate, thereby deliberately removing them from the protection of the law. She points out that, according to numerous sources, for nearly a decade the Algerian security forces carried out a series of massive and systematic arbitrary arrests followed by enforced disappearances of civilians, claiming an estimated 7,000 to 20,000 victims. The chances of finding the author's husband and son alive are minimal, and, even if their disappearance has not resulted in their deaths, the threat to their lives would still constitute a violation of article 6, in conjunction with article 2, paragraph 3, of the Covenant.

3.3 The author recalls that, according to the Committee's jurisprudence, the mere fact of being subjected to enforced disappearance constitutes inhuman or degrading treatment.[5] The anguish and suffering caused by indefinite detention without contact with the family or the outside world constitute treatment in breach of article 7 of the Covenant.[6] In addition, on 22 September 1994, the author's husband was tortured for several hours by police officers in the bathroom of the family home, at times in the presence of two of his daughters. Moreover, the Cité de la Montagne police station in Bourouba, where the victims are thought to have been detained, is known for the systematic torture and abuse practised there, particularly at the time when the events occurred. This suggests that the victims were subjected to treatment that violates article 7 of the Covenant. The author also considers that the disappearance of her husband and her son has been, and continues to be, for herself and for her close relatives, a paralysing, painful and distressing experience, to the extent that the family of the disappeared persons knows nothing of the victims' fate or, if they are in fact dead, of the circumstances of their death and the place where they are buried. In addition, in the author's view, the fact that two of Abdelkrim Azizi's daughters were forced to watch their father being tortured should be regarded as constituting treatment prohibited under article 7 of the Covenant. Watching the torture inflicted on their father could only have exacerbated the mental anguish suffered by the victims' family members, since it showed them the methods used by the police and made the disappearance of Abdelkrim and Abdessamad Azizi all the more unbearable. Referring to the Committee's jurisprudence,[7] the author concludes that the State party has also violated her rights under article 7, read alone and in conjunction with article 2, paragraph 3, of the Covenant.

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[4] The author refers to the definition of "enforced disappearance" given in article 7 (para. 2 (i)) of the Rome Statute of the International Criminal Court and to article 2 of the International Convention for the Protection of All Persons from Enforced Disappearance.

[5] Communication No. 449/1991, *Barbarín Mojica v. Dominican Republic*, Views adopted on 15 July 1994.

[6] Communication No. 950/2000, *Mr. S. Jegatheeswara Sarma v. Sri Lanka*, Views adopted on 16 July 2003, para. 9.5.

3.4 The author recalls the Committee's settled jurisprudence whereby any unacknowledged detention constitutes a complete negation of the right to liberty and security guaranteed by article 9 of the Covenant and an extremely serious violation of this article.[8] She argues that the victims' arrest without a warrant on 22 September 1994 and the failure to inform them of the reasons for their arrest constitute a violation of article 9, paragraphs 1 and 2, of the Covenant. Moreover, the State party's legislation limits the period of lawful custody to 48 hours generally, 96 hours where the charges concern a risk to State security, and 12 days where terrorist or subversive acts are concerned. Once these time limits have passed, the arrested person must be either brought before a judicial authority or released, which was not done in the case of Abdelkrim and Abdessamad Azizi. As they were held incommunicado, with no possibility of contacting the outside world, the victims were unable to challenge the lawfulness of their detention, or ask a judge to order their release, or even ask a third party to defend them. Therefore, the author submits that the State party has acted in violation of article 9, paragraphs 1 to 4, of the Covenant.

3.5 Since her husband and her son were the victims of a violation of article 7 of the Covenant and they were not treated with humanity or with respect for the inherent dignity of the human person, owing to the fact that they were held incommunicado and suffered ill-treatment, the author claims that they were victims of a violation by the State party of article 10, paragraph 1, of the Covenant.

3.6 Citing the Committee's jurisprudence,[9] the author also claims that, as victims of enforced disappearance, Abdelkrim and Abdessamad Azizi were denied the protection of the law, in violation of article 16 of the Covenant.

3.7 The author argues that the actions of the police officers, by breaking down the door of her home without a warrant, torturing her husband, arresting him and her son, subjecting other members of the family to physical and psychological violence — particularly by forcing the author's daughters to witness their father being tortured — and repeatedly robbing and causing significant damage to the Azizi home over several days, constitute a violation of article 17 of the Covenant.[10]

3.8 The enforced disappearance of her husband and son has destroyed the author's family life. She was left alone with her three daughters and her youngest son, then 10 years of age. The author maintains that the State party has failed in its duty to protect her family and has thus violated article 23, paragraph 1, of the Covenant.[11]

3.9 The author maintains that, since all the steps she took to discover her husband's and her son's fate were fruitless, the State party did not fulfil its obligation to guarantee Abdelkrim and Abdessamad Azizi an effective remedy, since it should have conducted an in-depth and diligent investigation into their disappearance and informed the family of the results of the investigation. The absence of an effective remedy is compounded by the fact that a total and general amnesty was legally declared following the promulgation on 27

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[7] Communication No. 107/1981, *Almeida de Quinteros v. Uruguay*, Views adopted on 21 July 1983. See also the Committee's concluding observations on its consideration of the second periodic report of Algeria, CCPR/C/79/Add.95, adopted on 18 August 1998, para. 10 in fine.

[8] Communication No. 612/1995, *Vicente et al. v. Colombia*, Views adopted on 29 July 1997.

[9] Communication No. 1327/2004, *Grioua v. Algeria*, Views adopted on10 July 2007, para. 7.9.

[10] Communication No. 687/1996, *Rojas García v. Colombia*, Views adopted on 3 April 2001, para. 10.3.

[11] Communication No. 962/2001, *Mulezi v. the Democratic Republic of the Congo*, Views adopted on 8 July 2004, para. 5.4.

February 2006 of Ordinance No. 06-01 implementing the Charter for Peace and National Reconciliation, which prohibits, on pain of imprisonment, the pursuit of legal remedies to shed light on the most serious crimes such as enforced disappearances, guaranteeing impunity to the individuals responsible for violations. This amnesty law is in breach of the State's obligation to investigate serious violations of human rights and of the right of victims to an effective remedy. The author concludes that the State party violated article 2, paragraph 3, of the Covenant with regard to herself, and with regard to her husband and her son.

State party's observations on admissibility

4.1 On 6 October 2010, the State party contested the admissibility of the communication. It is of the view that the communication, which incriminates public officials, or persons acting on behalf of public authorities, in cases of enforced disappearance during the period in question — from 1993 to 1998 — should be considered within the broader context of the sociopolitical situation and should be declared inadmissible. The individual focus in this complaint does not reflect the national sociopolitical and security context in which the alleged events are said to have occurred, and does not reflect reality or the factual diversity of the situations covered by the generic term "enforced disappearance" during the period in question.

4.2 In this respect, and contrary to the theories propounded by international NGOs, which the State party finds to not be very objective, the painful ordeal of terrorism that the State party experienced cannot be seen as a civil war between two opposing camps; rather, it was a crisis that led to the spread of terrorism following calls for civil disobedience. This in turn led to the emergence of a multitude of armed groups engaged in terrorist crimes, acts of subversion, the destruction and sabotage of public infrastructure, and acts of terror targeting the civilian population. In the 1990s, as a result, the State party went through one of the most terrible ordeals of its young life as an independent country. In this context, and in accordance with the Constitution (arts. 87 and 91), precautionary measures were implemented, and the Algerian Government informed the Secretariat of the United Nations of its declaration of a state of emergency, in accordance with article 4, paragraph 3, of the Covenant.

4.3 During this period, terrorist attacks were a daily occurrence in the country; they were carried out by a host of ideologically driven armed groups with little in the way of hierarchy, which severely diminished the ability of the authorities to control the security situation. As a result, there was some confusion in the manner in which a number of operations were carried out among the civilian population, and it was difficult for civilians to distinguish between the actions of terrorist groups and those of the security forces, to whom civilians often attributed enforced disappearances. According to a variety of independent sources, including the press and human rights organizations, the concept of disappearances in Algeria during the period in question covers six possible scenarios, none of which can be blamed on the State. The first scenario cited by the State party concerns persons reported missing by their relatives but who in fact had chosen to go into hiding in order to join an armed group and who instructed their families to report that they had been arrested by the security services, as a way of "covering their tracks" and avoiding being "harassed" by the police. The second scenario concerns persons who were reported missing after their arrest by the security services but who took advantage of their subsequent release to go into hiding. The third scenario concerns persons abducted by armed groups which, because they were not identified or because they had stolen uniforms or identification documents from police officers or soldiers, were mistakenly thought to belong to the armed forces or security services. The fourth scenario concerns persons reported missing who abandoned their families, and sometimes even left the country, to escape from personal problems or family disputes. The fifth scenario concerns persons reported missing by their family but who were in fact wanted terrorists who had been killed and buried in the maquis following factional infighting, doctrinal disputes or arguments over the spoils of war among rival armed groups. The sixth scenario mentioned by the State party concerns persons reported missing who were actually living in Algeria or abroad under a false identity provided by a network of document forgers.

4.4 The State party maintains that it was in view of the diversity and complexity of the situations covered by the general concept of disappearance that the Algerian legislature, following the referendum on the Charter for Peace and National Reconciliation, recommended a comprehensive approach to the issue of disappeared persons, whereby all persons who had disappeared in the context of the "national tragedy" would be cared for, all victims would be offered support to overcome their ordeal and all victims of disappearance and their beneficiaries would be entitled to redress. According to statistics from the Ministry of the Interior, 8,023 cases of disappearance have been reported, 6,774 examined, 5,704 approved for compensation and 934 rejected, with 136 still pending. A total of 371,459,390 Algerian dinars (DA) has been paid out as compensation to all the victims concerned. In addition, a total of DA 1,320,824,683 has been paid out in monthly pensions.

4.5 The State party further argues that not all domestic remedies have been exhausted. It stresses the importance of distinguishing between simple formalities involving the political or administrative authorities, non-judicial remedies pursued through advisory or mediation bodies, and judicial remedies pursued through the relevant courts of justice. The State party observes that, as may be seen from the authors' statements, the complainants have written letters to political and administrative authorities, petitioned advisory or mediation bodies and petitioned representatives of the prosecution service (chief prosecutors and public prosecutors), but have not, strictly speaking, initiated legal action and seen it through to its conclusion by availing themselves of all available remedies of appeal and judicial review. Of all these authorities, only the representatives of the prosecution service are authorized by law to open a preliminary inquiry and refer a case to the investigating judge. In the Algerian legal system, it is the public prosecutor who receives complaints and who, if warranted, institutes criminal proceedings. Nevertheless, in order to protect the rights of victims or their beneficiaries, the Code of Criminal Procedure authorizes the latter to sue for damages by filing a complaint with the investigating judge. In this case, it is the victim, not the prosecutor, who initiates criminal proceedings by bringing the matter before the investigating judge. This remedy, which is provided for in articles 72 and 73 of the Code of Criminal Procedure, was not utilized, despite the fact that it would have enabled the victims to institute criminal proceedings and compel the investigating judge to initiate proceedings, even if the prosecution service had decided otherwise.

4.6 The State party also notes the authors' contention that it is impossible to consider that any effective and available domestic remedies exist in Algeria to which the families of victims of disappearance could have recourse, on account of the adoption by referendum of the Charter for Peace and National Reconciliation and its implementing legislation – in particular, article 45 of Ordinance No. 06-01. On this basis, the authors believed they did not need to bring the matter before the relevant courts, in view of the latter's likely position and findings regarding the application of the Ordinance. However, the authors cannot invoke this Ordinance and its implementing legislation as a pretext for failing to institute the legal proceedings available to them. The State party recalls the Committee's jurisprudence to the effect that a person's subjective belief in, or presumption of, the futility of a remedy does not exempt that person from the requirement to exhaust all domestic remedies.[12]

4.7 The State party then turns its attention to the nature, principles and content of the Charter for Peace and National Reconciliation and its implementing legislation. It maintains that, in accordance with the principle of the inalienability of peace, which has become an international right to peace, the Committee should support and consolidate peace and encourage national reconciliation with a view to strengthening States affected by domestic crises. As part of this effort to achieve national reconciliation, the State party adopted the Charter, and its implementing Ordinance prescribes legal measures for the discontinuance of criminal proceedings and the commutation or remission of sentences for any person who is found guilty of acts of terrorism or who benefits from the provisions of the legislation on civil dissent, except for persons who have committed or been accomplices in mass killings, rapes or bombings in public places. This ordinance also introduces a procedure for filing an official finding of presumed death, which entitles beneficiaries to receive compensation as victims of the "national tragedy". Social and economic measures have also been put in place, including the provision of employment placement assistance and compensation for all persons considered victims of the "national tragedy". Finally, the Ordinance prescribes political measures, such as a ban on holding political office for any person who exploited religion in the past in a way that contributed to the "national tragedy", and establishes the inadmissibility of any proceedings brought against individuals or groups who are members of any branch of Algeria's defence and security forces for actions undertaken to protect persons and property, safeguard the nation and preserve its institutions.

4.8 In addition to the establishment of the fund to compensate all victims of the "national tragedy", the sovereign people of Algeria have, according to the State party, agreed to a process of national reconciliation to heal the wounds inflicted. The State party insists that the proclamation of the Charter for Peace and National Reconciliation reflects a desire to avoid confrontation in the courts, media outpourings and political score settling. The State party is therefore of the view that the authors' allegations are covered by the comprehensive domestic settlement mechanism provided for in the Charter.

4.9 The State party asks the Committee to note how similar the facts and situations described by the author are and to take into account the sociopolitical and security context in which they occurred; to find that the author failed to exhaust all domestic remedies; to recognize that the authorities of the State party have established a comprehensive domestic mechanism for processing and settling the cases referred to in these communications through measures aimed at achieving peace and national reconciliation that are consistent with the principles of the Charter of the United Nations and subsequent covenants and conventions; to find the communication inadmissible; and to request that the author seek an alternative remedy.

Author's comments on the State party's submission

5.1 In her comments dated 13 May 2011, the author considers that the State party's adoption of domestic legislative and administrative measures to support the victims of the "national tragedy" cannot be invoked at the admissibility stage to prohibit individuals subject to its jurisdiction from using the procedure provided for under the Optional Protocol. In the case in point, the legislative measures adopted in themselves amount to a violation of the rights enshrined in the Covenant, as the Committee has previously observed.[13]

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[12] The State party cites in particular communications Nos. 210/1986 and 225/1987, *Pratt and Morgan v. Jamaica*, Views adopted on 6 April 1989.

5.2 The author recalls that the declaration of a state of emergency made by Algeria on 9 February 1992 does not affect people's right to submit individual communications to the Committee. The author therefore considers that the State party's observations on the appropriateness of the communication do not constitute a ground for inadmissibility.

5.3 The author also refers to the State party's argument that the requirement to exhaust domestic remedies calls on the author to institute criminal proceedings by filing a complaint with the investigating judge, in accordance with articles 72 et seq. of the Code of Criminal Procedure. She refers to the Committee's jurisprudence[14] and considers that, given the serious nature of the alleged offences, the fact that the family did not sue for damages cannot be invoked as a means to palliate the lack of the criminal proceedings that should have been initiated by the State party on its own initiative. Therefore, suing for damages in such cases is not a prerequisite for satisfying the requirement of exhaustion of domestic remedies. Clearly, domestic remedies have proved totally ineffective. Both the judicial and the government authorities were informed of the arrest of Abdessamad and Abdelkrim Azizi, but the motives for their arrest, as well as their current whereabouts, remain unknown. No investigation was ordered, no inquiry was launched, and none of the police officers involved — who could have been easily identified — were called to account. The State party has not fulfilled its duty to investigate and establish the facts about all serious violations of human rights.

5.4 As to the State party's argument that mere "subjective belief or presumption" does not exempt the author of a communication from the requirement to exhaust all domestic remedies, the author cites the Committee's established jurisprudence, which stipulates that, in order to satisfy the requirements set out in article 5 of the Optional Protocol to the Covenant, the remedies must be effective, useful and available and must offer the author of the communication a reasonable prospect of redress.[15] The author also refers to article 45 of Ordinance No. 06-01, which provides that no legal proceedings can be brought against individuals or groups who are members of the defence or security forces. Any person making such a complaint or allegation is liable to a term of imprisonment of 3 to 5 years or a fine of DA 250,000 to DA 500,000. Citing the Human Rights Committee, the author also points out that Ordinance No. 06-01 promotes impunity, infringes the right to an effective remedy and is not compatible with the Covenant.[16] The author considers that the State party has therefore not convincingly demonstrated how suing for damages would have enabled the competent courts to receive and investigate complaints, since this would involve violating article 45 of the Ordinance, nor how the author could have been guaranteed immunity from prosecution under article 46 of the Ordinance. Based on a reading of these provisions, the author concludes that any complaint regarding the violations suffered by the author, her husband and her son would be not only declared inadmissible, but also treated as a criminal offence. The author notes that the State party fails to provide an example of any case which, despite the existence of the above-mentioned Ordinance, has led to the effective prosecution of the perpetrators of human rights violations in a similar case. The author concludes that the remedies mentioned by the State party are futile.

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[13] CCPR/C/DZA/CO/3, paras. 7, 8 and 13; communication No. 1588/2007, *Benaziza v. Algeria*, Views adopted on 26 July 2010, para. 9.2; communication No. 1196/2003, *Boucherf v. Algeria*, Views adopted on 30 March 2006, para. 11; and the concluding observations of the Committee against Torture on the third periodic report of Algeria, CAT/C/DZA/CO/3, adopted on 13 May 2008, paras. 11, 13 and 17.

[14] *Benaziza v. Algeria*, para. 8.3.

[15] Communication No. 437/1990, *Colamarco Patiño v. Panama*, decision adopted on 21 October 1994, para. 5.2.

[16] CCPR/C/DZA/CO/3, paras. 7, 8 and 13.

5.5 With regard to the merits of the communication, the author notes that the State party has simply listed the general scenarios in which the victims of the "national tragedy" might have disappeared. Such general observations do not dispute the allegations made in the present communication. Furthermore, the comments are listed in the same way as in a number of other cases, thus demonstrating the State party's continuing unwillingness to consider such cases individually and to accept responsibility, in respect of the author of this communication, for the suffering that she and her family have endured.

5.6 The author asks that the Committee consider her claims to be sufficiently substantiated, given that she is unable to provide additional information in support of her communication, as only the State party holds precise information about the victims' fate.

5.7 The author considers that the absence of a response on the merits of the communication constitutes a tacit acknowledgement of the accuracy of the facts alleged. The State party's silence constitutes a recognition of failure in its duty to carry out an investigation into the case of enforced disappearance brought to its attention, as otherwise it would have been in a position to provide a detailed response based on the results of the investigations that it should have conducted. With regard to the merits, the author maintains all the allegations set out in her initial communication.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Firstly, the Committee recalls that the decision by the Special Rapporteur to examine the admissibility and the merits jointly (see paragraph 1.2) does not preclude their being considered separately by the Committee. The joinder of admissibility and the merits does not mean they must be examined simultaneously. Consequently, before considering any claim contained in a communication, the Committee must decide, in accordance with rule 93 of its rules of procedure, whether the communication is admissible under the Optional Protocol to the Covenant.

6.2 Under article 5, paragraph 2 (a), of the Optional Protocol, the Committee must ascertain that the same matter is not being examined under another procedure of international investigation or settlement. The Committee notes that the disappearances of Abdelkrim and Abdessamad Azizi were reported to the Working Group on Enforced or Involuntary Disappearances. However, it recalls that the extra-conventional procedures or mechanisms established by the Commission on Human Rights or the Human Rights Council, whose mandates are to examine and report publicly on human rights situations in specific countries or territories or on cases of widespread human rights violations worldwide, do not generally constitute an international procedure of investigation or settlement within the meaning of article 5, paragraph 2 (a), of the Optional Protocol.[17] Accordingly, the Committee considers that the examination of Abdelkrim and Abdessamad Azizi's case by the Working Group on Enforced or Involuntary Disappearances does not render the present communication inadmissible under this provision.

6.3 The Committee notes that, in the State party's view, the author has not exhausted domestic remedies since she did not consider the possibility of bringing the matter before the investigating judge and suing for damages in criminal proceedings under articles 72 and 73 of the Code of Criminal Procedure. The Committee also notes that, according to the

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[17] Communication No. 1874/2009, *Mihoubi v. Algeria*, Views adopted on 18 October 2013, para. 6.2.

State party, the author has simply written letters to political and administrative authorities and petitioned advisory or mediation bodies and representatives of the prosecution service and that she has not, strictly speaking, initiated legal action and seen it through to its conclusion by availing herself of all available remedies of appeal. The Committee notes in this respect the author's claim that the very next day after Abdelkrim and Abdessamad Azizi's arrest she made enquiries at the Cité de la Montagne police station in Bourouba, at the Algiers central police station, at El Harrach prison and at Serkadji prison, without success. According to the author's account, she also made enquiries with the prosecutor of the Court of El Harrach and the chief prosecutor of the Court of Algiers, and submitted many petitions to representatives of the Government of the State party — including some submitted through a lawyer — and then to the Algerian League for the Defence of Human Rights and to the National Observatory for Human Rights, without success. Only the Ombudsman sent her a reply acknowledging receipt of her claims. None of these actions resulted in effective investigations or the prosecution and conviction of those responsible.

6.4 The Committee recalls that the State party has a duty not only to conduct thorough investigations of alleged violations of human rights brought to the attention of its authorities, including in particular enforced disappearances and violations of the right to life, but also to prosecute, try and punish any person assumed to be responsible for such violations.[18] Although the author repeatedly contacted the competent authorities about the disappearance of her husband and her son, the State party failed to conduct a thorough or in-depth investigation into the disappearance of Abdelkrim and Abdessamad Azizi, despite the fact that serious allegations of enforced disappearance were involved. The State party has also failed to provide sufficient evidence that an effective remedy is actually available, since Ordinance No. 06-01 of 27 February 2006 continues to be applicable despite the Committee's recommendations that it should be brought into line with the Covenant.[19] Moreover, given the vague wording of articles 45 and 46 of the Ordinance, and in the absence of satisfactory information from the State party about their interpretation and actual enforcement, the author's fears about the effectiveness of filing a complaint are reasonable. The Committee recalls that, for a communication to be deemed admissible, the authors must have exhausted only the remedies effective against the alleged violation. In addition, recalling its jurisprudence, the Committee reiterates that to sue for damages for offences as serious as those alleged in the present case cannot be considered a substitute for the charges that should have been brought by the public prosecutor.[20] The Committee therefore concludes that article 5, paragraph 2 (b), of the Optional Protocol is not an obstacle to the admissibility of the communication.

6.5 The Committee considers that the author has sufficiently substantiated her claims insofar as they raise issues under articles 6 (para. 1), 7, 9 (paras. 1–4), 10 (para. 1), 16, 17, 23 (para. 1) and 2 (para. 3) of the Covenant, and therefore proceeds to consider the communication on the merits.

Consideration of the merits

7.1 The Human Rights Committee has considered the communication in the light of all the information made available to it by the parties, as required under article 5, paragraph 1, of the Optional Protocol.

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[18] Communication No. 1884/2009, *Aouali et al. v. Algeria*, Views adopted on18 October 2013, para. 6.4.

[19] CCPR/C/DZA/CO/3, paras. 7, 8 and 13.

[20] *Aouali et al. v. Algeria*, para. 6.4.

7.2 In the communication, the State party has provided general and collective comments on the serious allegations made by the author, and has been content to argue that communications incriminating public officials or persons acting on behalf of public authorities in cases of enforced disappearance between 1993 and 1998 should be looked at in the broader context of the domestic sociopolitical and security environment that prevailed during a period in which the Government had to deal with terrorism. The Committee observes that the Covenant demands that the State party concern itself with the fate of every individual, and treat every individual with respect for the dignity that inheres in every human being. In addition, the Committee recalls its jurisprudence,[21] according to which the State party may not invoke the provisions of the Charter for Peace and National Reconciliation against persons who invoke provisions of the Covenant or who have submitted or may submit communications to the Committee. Without the amendments recommended by the Committee, Ordinance No. 06-01 appears to promote impunity and therefore cannot, as it currently stands, be considered compatible with the Covenant.[22]

7.3 The Committee notes that the State party has not replied to the author's claims concerning the merits of the case, and recalls its jurisprudence,[23] according to which the burden of proof should not rest solely on the author of a communication, especially given that authors and the State party do not always have the same degree of access to evidence and that often only the State party is in possession of the necessary information. It is implicit in article 4, paragraph 2, of the Optional Protocol that the State party has a duty to investigate in good faith all allegations of violations of the Covenant made against it and its representatives and to provide the Committee with whatever information is available to it.[24] In the absence of any explanations from the State party in this respect, due weight must be given to the author's allegations, provided they have been sufficiently substantiated.

7.4 The Committee notes that, according to the author, her husband and son have been missing since their arrest on 22 September 1994 and that the authorities have not only never admitted arresting them but have also failed to conduct any effective investigation that might shed light on their fate. It notes that, according to the author, the chances of finding Abdelkrim and Abdessamad Azizi alive are minimal, and that their prolonged absence and the testimony of the former deputy brigade chief of the Cité de la Montagne police station in Bourouba suggest that they have died while in detention; that incommunicado detention creates a high risk of violation of the right to life, since victims are at the mercy of their jailers who, by the very nature of the circumstances, are subject to no oversight. The Committee recalls that, in cases of enforced disappearance, the deprivation of liberty, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate of the disappeared person, removes the person from the protection of the law and places his or her life at serious and constant risk, for which the State is accountable. In the case at hand, the Committee notes that the State party has produced no evidence to indicate that it has fulfilled its obligation to protect the lives of Abdelkrim and Abdessamad Azizi. Therefore the Committee concludes that the State party has failed in its duty to protect the lives of Abdelkrim and Abdessamad Azizi, in violation of article 6 of the Covenant.[25]

7.5 The Committee recognizes the degree of suffering involved in being held indefinitely without contact with the outside world. It recalls its general comment No. 20

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[21] *Aouali et al. v. Algeria*, para. 7.2.

[22] CCPR/C/DZA/CO/3, para. 7 (a).

[23] *Aouali et al. v. Algeria*, para. 7.3.

[24] Communication No. 1297/2004, *Medjnoune v. Algeria*, 14 July 2006, para. 8.3.

[25] *Aouali et al. v. Algeria*, para. 7.4.

(1992) on article 7,[26] which recommends that States parties should make provision against incommunicado detention. The Committee notes that, according to the author, Abdelkrim and Abdessamad Azizi were arrested by police officers from the Cité de la Montagne police station in Bourouba on 22 September 1994 in El Harrach (Algiers), at the Azizi family home. They were allegedly also subjected to torture at the Cité de la Montagne police station in Bourouba, according to some of their fellow detainees who were subsequently released and according to former police officer Rebai. Abdelkrim Azizi was also allegedly tortured by police officers in the bathroom of the family home, according to testimony from members of his family. In the absence of a satisfactory explanation from the State party, the Committee finds a violation of article 7 of the Covenant in respect of Abdelkrim and Abdessamad Azizi.[27]

7.6 The Committee also takes note of the anguish and distress that the disappearance of Abdelkrim and Abdessamad Azizi has caused to their wife and mother, the author. It also notes that the police officers forced two of the author's daughters to watch as the police officers tortured Abdelkrim Azizi, and that the police officers made repeated visits to the author's home, which they robbed and vandalized. The Committee notes that the State party has not refuted these allegations. The Committee also considered that the prohibition in article 7 relates not only to acts that cause physical pain but also to acts that cause mental suffering to the victim.[28]

7.7 The Committee notes that, in this case, it was the authorities of the State party who robbed and vandalized the family home and store-room on the night of and days following the arrest of Abdelkrim and Abdessamad Azizi; that these acts of destruction were ordered without a warrant; and that the author and her family looked on helplessly as their husband and father were tortured and as their home and store-room were robbed and vandalized. Under the circumstances, the Committee considers that these acts amount to reprisals and intimidation causing intense mental suffering for the author and her family. The Committee finds a separate violation of article 7 of the Covenant with respect to Abdelkrim and Abdessamad Azizi and the author.[29]

7.8 With regard to the alleged violation of article 9, the Committee takes note of the author's allegations, to the effect that Abdelkrim and Abdessamad Azizi were arrested by the police on 22 September 1994 without any explanation, and that following their arrest they were detained at the Cité de la Montagne police station in Bourouba. The authorities of the State party have not at any point provided the family with information about the fate of Abdelkrim and Abdessamad Azizi. The latter were not charged and were not brought before a judicial authority, which would have enabled them to challenge the lawfulness of their detention; moreover, no official information was given to the author or her family about the whereabouts of their detention or their fate. In the absence of satisfactory explanations from the State party, the Committee finds a violation of article 9 with respect to Abdelkrim and Abdessamad Azizi.[30]

7.9 With regard to the complaint under article 10, paragraph 1, the Committee reiterates that persons deprived of their liberty may not be subjected to any hardship or constraint other than that resulting from the deprivation of liberty and that they must be treated with humanity and respect for their dignity. In view of their incommunicado detention and in the absence of information provided by the State party in that regard, the Committee finds a violation of article 10, paragraph 1, of the Covenant with respect to Abdelkrim and Abdessamad Azizi.[31]

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[26] *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40* (A/47/40), annex VI, sect. A.

[27] Communication No. 1295/2004, *El Alwani v. The Libyan Arab Jamahiriya*, Views adopted on 11 July 2007, para. 6.5; and communication No. 1422/2005, *El Hassy v. The Libyan Arab Jamahiriya*, Views adopted on 24 October 2007, para. 6.2.

[28] *Aouali et al. v. Algeria*, para. 7.7.

[29] *Aouali et al. v. Algeria*, para. 7.8.

[30] Communications No. 1905/2009, *Khirani v. Algeria*, Views adopted on 26 March 2012, para. 7.7 and No. 1781/2008, *Berzig v. Algeria*, Views adopted on 31 October 2011, para. 8.7.

7.10 With regard to the alleged violation of article 16, the Committee reiterates its established jurisprudence, according to which the intentional removal of a person from the protection of the law for a prolonged period of time may constitute a refusal to recognize that person as a person before the law if the victim was in the hands of the State authorities when last seen and if the efforts of his or her relatives to obtain access to potentially effective remedies, including judicial remedies (art. 2, para. 3 of the Covenant), have been systematically impeded.[32] In the present case, the Committee notes that the authorities of the State party have not provided any information to the family about the fate or whereabouts of Abdelkrim and Abdessamad Azizi since their arrest, despite the many requests to various authorities of the State party. The Committee concludes that Abdelkrim and Abdessamad Azizi's enforced disappearance since 22 September 1994 denied them the protection of the law and deprived them of their right to recognition as persons before the law, in violation of article 16 of the Covenant.

7.11 With regard to the alleged violation of article 17 of the Covenant, the Committee notes the author's claim, which the State party has not refuted, that police officers from the Cité de la Montagne police station in Bourouba searched the Azizi family home and store-room without a warrant, causing damage, and seized jewellery, money, foodstuffs and identity papers. The Committee concludes that the entry of State officials into the Azizi home and store-room in such circumstances constitutes unlawful interference in the privacy, family and home of Abdelkrim and Abdessamad Azizi, in violation of article 17 of the Covenant in respect of Abdelkrim and Abdessamad Azizi and the author.[33]

7.12 In light of the above, the Committee will not consider the claims based on the violation of article 23, paragraph 1, of the Covenant separately.

7.13 The author invokes article 2, paragraph 3, of the Covenant, which imposes on States parties the obligation to ensure an effective remedy for all persons whose Covenant rights have been violated. The Committee attaches importance to the establishment by States parties of appropriate judicial and administrative mechanisms for addressing claims of rights violations. It refers to its general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant,[34] according to which the failure by a State party to investigate allegations of violations could in itself give rise to a separate breach of the Covenant. In the present case, although the victim's family repeatedly contacted the competent authorities regarding the disappearance of Abdelkrim and Abdessamad Azizi, including judicial authorities such as the prosecutor of Algiers and the prosecutor of El Harrach, all their efforts proved futile and the State party failed to conduct a thorough and effective investigation into the disappearance of Abdelkrim and Abdessamad Azizi, even though the latter had been arrested by State officials. Furthermore, the absence of the legal right to undertake judicial proceedings since the promulgation of Ordinance No. 06-01 implementing the Charter for Peace and National Reconciliation continues to deprive Abdelkrim and Abdessamad Azizi and their family of any access to an effective remedy, since the Ordinance prohibits the initiation of legal proceedings to shed light on the most serious crimes, such as enforced disappearances.[35] In the light of the foregoing, the Committee concludes that the facts before it reveal a violation of article 2 (para. 3), read in conjunction with articles 6, 7, 9, 10, 16 and 17 of the Covenant, with respect to Abdelkrim and Abdessamad Azizi, and of article 2 (para. 3), read in conjunction with articles 7 and 17 of the Covenant with respect to the author.

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[31] See general comment No. 21 [44] on art. 10, para. 3, and, inter alia, communication No. 1780/2008, *Zarzi v. Algeria*, Views adopted on 22 March 2011, para. 7.8.

[32] Communication No. 1905/2009, supra, note 29, para. 7.8.

[33] Communication No. 1884/2009, *Faraoun v. Algeria*, 18 October 2013, para. 7.12.

[34] *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 40* (A/59/40 (vol. I)), annex III.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the information before it discloses a violation by the State party of articles 6, 7, 9, 10, 16 and 17, and of article 2 (para. 3) read in conjunction with articles 6, 7, 9, 10, 16 and 17 of the Covenant with respect to Abdelkrim and Abdessamad Azizi. The Committee also finds a violation of articles 7 and 17 and of article 2 (para. 3) read in conjunction with articles 7 and 17 of the Covenant with respect to the author.

9. In accordance with article 2, paragraph 3, of the Covenant, the State party is under an obligation to provide the family of Abdelkrim and Abdessamad Azizi with an effective remedy, including by: (a) conducting a thorough and effective investigation into the disappearance of Abdelkrim and Abdessamad Azizi; (b) providing their family with detailed information about the results of its investigation; (c) releasing them immediately if they are still being detained incommunicado; (d) in the event that Abdelkrim and Abdessamad Azizi are deceased, handing over their remains to their family; (e) prosecuting, trying and punishing those responsible for the violations committed; and (f) providing adequate compensation to the author for the violations suffered and to Abdelkrim and Abdessamad Azizi, if they are still alive. Notwithstanding the terms of Ordinance No. 06-01, the State party should ensure that it does not impede enjoyment of the right to an effective remedy for the victims of crimes such as torture, extrajudicial killings and enforced disappearances. The State party is also under an obligation to take measures to prevent similar violations in the future.

10. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether or not there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when a violation has been established, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views and to have them widely disseminated in the official languages of the State party.

[Adopted in English, French and Spanish, the French text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

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[35] CCPR/C/DZA/CO/3, para. 7.

Appendix

Joint opinion of Committee members Mr. Fabián Omar Salvioli and Mr. Victor Manuel Rodríguez-Rescia (concurring)

1. We share the opinion of the Committee and the conclusions that it has reached in *Marouf v. Algeria* (communication No. 1889/2009). Consistent with what we have stated on several previous occasions in similar cases,[a] we consider that, in the present instance, the Committee should have indicated that, by adopting Ordinance No. 06-01, certain provisions of which — in particular article 46 — are clearly incompatible with the Covenant, the State has failed to comply with the general obligation set forth in article 2, paragraph 2, of the Covenant. The Committee should also have found a violation of article 2, paragraph 2, read in conjunction with other substantive provisions of the Covenant. With regard to redress, we consider that the Committee should have recommended that the State bring Ordinance No. 06-01 into line with the Covenant.

2. For the sake of brevity, we refer the reader to the arguments put forward in our joint opinion concerning *Mihoubi v. Algeria* (communication No. 1874/2009).

[Done in English, French and Spanish, the Spanish text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

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[a] See, for example, our joint opinion in *Mihoubi v. Algeria*, communication No. 1874/2009.

U. Communication No. 1890/2009, *Baruani v. Democratic Republic of the Congo* (Views adopted on 27 March 2014, 110th session)[*]

Submitted by:	Franck Kitenge Baruani (represented by Anna Copeland, SCALES Community Legal Centre)
Alleged victim:	The author
State party:	Democratic Republic of the Congo
Date of communication:	9 June 2009 (initial submission)
Subject matter:	Arbitrary arrest and torture, being accused of spying for another country and wanting to overthrow the Government
Procedural issue:	Exhaustion of domestic remedies
Substantive issues:	Torture or cruel, inhuman or degrading treatment or punishment; arbitrary arrest; arbitrary or unlawful interference with privacy, family or home
Articles of the Covenant:	7; 9; 17
Article of the Optional Protocol:	5 (2 b)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Having concluded its consideration of communication No. 1890/2009, submitted to the Human Rights Committee on behalf of Franck Kitenge Baruani under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Meeting on 27 March 2014,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Franck Kitenge Baruani, a national of the Democratic Republic of the Congo and a permanent resident of Australia by virtue of a humanitarian visa. He was born on 27 December 1972. He claims to be a victim of a violation of articles 7, 9 and 17 of the International Covenant on Civil and Political Rights. The Democratic Republic of the Congo acceded to the Optional Protocol to the Covenant

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[*] The following Committee members participated in the examination of the present communication: Mr. Yadh Ben Achour, Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Walter Kälin, Ms. Zonke Zanele Majodina, Mr. Gerald L. Neuman, Sir Nigel Rodley, Mr. Victor Manuel Rodríguez-Rescia, Mr. Fabián Omar Salvioli, Ms. Anja Seibert-Fohr, Mr. Yuval Shany, Mr. Konstantine Vardzelashvili, Ms. Margo Waterval, and Mr. Andrei Paul Zlătescu.

on 1 November 1976. The author is represented by counsel, Anna Copeland, SCALES Community Legal Centre.

The facts as presented by the author

2.1 The author was born in Bukavu, South Kivu province in the Democratic Republic of the Congo. In September 1998, a group of rebels emerged under the banner of the Congolese Rally for Democracy (Rassemblement congolais pour la démocratie) in opposition to the Government of Laurent Kabila and allegedly supported by Rwandan forces. The Rally for Democracy was recruiting men from North and South Kivu by force. In September 1998, the author was forcibly removed from the university campus, detained by the Rally for Democracy for two nights in Bukavu, together with 20 other students, and then taken on a bus to Gabiro in Rwanda, where he was held in a camp. During this time, his captors tried to recruit him to support them in their plan to overthrow Laurent Kabila. After 10 months in Rwanda, he was returned to the headquarters of the Rally for Democracy in Goma, Democratic Republic of the Congo, where he was supposed to work for the Rally for Democracy movement. However, he managed to escape and returned to Bukavu. Fearing for his life, he then decided to move to Lubumbashi, province of Katanga, Democratic Republic of the Congo. In Lubumbashi, he received a certificate issued by the national intelligence service attesting that he was an internally displaced person.

2.2 On 16 April 2002, while completing an internship, the author was arrested by the Presidential Special Police Department, who accused him of being a spy for Rwanda and looking to stage a coup against President Joseph Kabila, son of Laurent Kabila who had been assassinated in January 2001. At the time, the author's wife had just given birth to his daughter, who was six weeks old. Upon his detention, he was not provided with any information about the charges against him, where he was being taken to or for how long. For seven days, he was moved around and held in different locations in Lubumbashi, because his university colleagues and human rights defenders were looking for him.

2.3 On 23 April 2002, the author was taken to the premises of the national intelligence service (Agence nationale de renseignements) in Lubumbashi, where he was ill-treated for two days. He was regularly beaten and accused of being a spy. He was shackled at the hands and feet and was dragged like this from one cell to another. He feared he would be killed. Then, he was moved to the premises of the national intelligence service in Kinshasa on board a special presidential plane.[1] He was held there for six months.

2.4 In the premises of the intelligence service in Kinshasa, the author was held in two different rooms: in one room he spent the day and in the other he was tortured during the night.[2] He was elevated vertically upside down by a machine and was continually beaten on his genitalia, backside and head with a thick metal rod that carried an electric charge. When hanging upside down, large metal pliers were connected to his tongue, which would then be pulled by the officials requesting him to confess that he was planning to kill Kabila and take power in Kinshasa. After having been beaten in this position, the machine released him and he fell to the floor unsupported. He had his genitalia repeatedly connected to an electric charge which caused him severe pain. He was also repeatedly beaten, kicked and punched. The officials inflicting torture on him accused him of hiding in Rwanda and being the leader of Rwandan forces. They also asked him about his university studies. Before being returned to his cell, a bucket of water would be thrown over him. In addition, he was deprived of food and water. While being held at the premises of the intelligence service in Kinshasa, the author had no contact with his wife and daughter and was very worried about them. As a consequence of the torture, he has had one testicle removed.[3]

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[1] The author notes that the pilot had a shirt, on which the word "Presidential" was embroidered on the collar.

[2] There is no information on the number of nights, during which he was exposed to the treatment he describes.

2.5 In July 2002, without prior notice, the author was taken to the Court of State Security[4] where he was informed that he was suspected of being an intelligence officer for Rwanda, Burundi and Uganda; however, no evidence against him was presented. He was represented by L'Observatoire Nationale des Droits de l'Homme, whose Chair he had met while in detention in Kinshasa. The same month, the Court of State Security moved him to the Makala civilian prison in Kinshasa, but without making a finding of guilt or a determination as to his sentence.

2.6 On 4 October 2002, the author was released from Makala civilian prison following growing public pressure by human rights organizations and his Lubumbashi university colleagues. The release document from prison stated that he had been imprisoned for an attempt on the security of the State, however he has never been sentenced for any crime. The author left for the Republic of the Congo seven days after his release from Makala prison because he feared for his safety. After arriving in the Congo, he registered with the Office of the United Nations High Commissioner for Refugees (UNHCR) and was granted refugee status in 2004. However, he was aware that his safety could not be guaranteed due the proximity of the two countries.

2.7 The author obtained a visa for Australia through UNHCR. He and his family moved to Australia on 21 August 2007. He has obtained trauma and torture counselling since arriving in Australia. According to his trauma counsellor, he suffers long-term consequences of the trauma of his detention and torture, including issues to do with sleep, appetite, somatic pain and interpersonal problems.

The complaint

3.1 The author claims that the available domestic remedies were ineffective,[5] as the Government was the perpetrator of the breaches against him and that those breaches were directly linked to the President and the executive.[6] He further claims that due to the threats on his life and the fear he felt, no remedy could safely be sought whilst he was in the Democratic Republic of the Congo.

3.2 The author claims that the State party has violated his right to be free from torture, cruel, inhuman and degrading treatment or punishment under article 7 of the Covenant. He states that the acts committed against him by the Congolese authorities during his detention amounted to torture.[7]

3.3 Moreover, the author claims that the State party has violated his right to be free from arbitrary arrest and detention under article 9, paragraph 1. He claims that his detention was not reasonable, necessary, proportionate, appropriate or justifiable and therefore arbitrary in the sense of article 9, paragraph 1.[8] He argues that there are no factors particular to him as an individual that would have rendered his detention and imprisonment necessary and reasonable. Whilst in detention, he was not informed of any charges against him, nor was he provided with any details of them.

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[3] A medical certificate of 14 May 2008 attests to a testicular operation post trauma, as well as to lower limb weakness related to spinal problems.

[4] The author claims that the Chair of the Court is nominated by the President and lacks independence.

[5] See communications No. 004/1977, *Ramirez v. Uruguay*, Views adopted on 23 July 1980, and No. 962/2001, *Mulezi v. Democratic Republic of the Congo*, Views adopted on 8 July 2004.

[6] See the preliminary note of the Special Rapporteur on the independence of judges and lawyers on his mission to the Democratic Republic of the Congo (A/HRC/4/25/Add. 3), in which he concluded that interference by the executive and the army in judicial proceedings was very common and that the judicial system was rarely effective.

[7] See communications No. 124/1982, *Muteba v. Zaire*, Views adopted on 24 July 1984; No. 194/1985, *Miango Muiyo v. Zaire*, Views adopted on 27 October 1987; and No. 005/1977, *Massera v. Uruguay*, Views adopted on 15 August 1979.

3.4 The author also claims that the State party has violated his right not to be subjected to arbitrary interference with his privacy, family or home under article 17.[9] He submits that his detention, which forced him to be separated from his wife and newborn daughter, amounts to an interference with his family life. He was deeply affected and mentally distressed by this separation.[10] He states that the interference with his privacy and family was arbitrary because he was taken from his place of employment, he received no notification of the charge against him, there was no judicial review of his detention and he did not have a full hearing with procedural safeguards. No consideration was given to the author's family in these processes and he was unable to communicate with his family between April and October 2002.

The State party's failure to cooperate

4. On 3 August 2009, 16 March 2010, 20 October 2010, 25 January 2011 and 19 November 2013, the State party was requested to submit to the Committee information on the admissibility and merits of the communication. The Committee notes that this information has not been received. The Committee regrets the failure of the State party to provide any information with regard to the admissibility or the merits of the author's claims. It recalls that it is implicit in article 4, paragraph 2, of the Optional Protocol that States parties examine in good faith all allegations brought against them and that they make available to the Committee all the information at their disposal. In the absence of a reply from the State party, due weight must be given to the author's allegations, to the extent that they are substantiated.

Issues and proceedings before the Committee

Consideration of admissibility

5.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with article 93 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

5.2 As required under article 5, paragraph 2 (a), of the Optional Protocol, the Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement.

5.3 Having taken note of the author's arguments concerning the exhaustion of domestic remedies and taking into account the lack of cooperation by the State party, the Committee concludes that there is nothing in article 5, paragraph 2 (b), of the Optional Protocol to prevent it from considering the communication.

5.4 The Committee notes the author's allegations that he was ill-treated from 23 to 25 April 2002 in the premises of the national intelligence service in Lubumbashi, that he was subjected to torture during his detention at the premises of the national intelligence service in Kinshasa from April to July 2002, that he was arbitrarily detained and that his detention forced him to be separated from his family which caused him deep mental distress. In the absence of any reply by the State party, the Committee considers that, for purposes of admissibility, the author has sufficiently substantiated his claims under articles 7, 9 and 17, of the Covenant.

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[8] See communications No. 1050/2002, *D and E v. Australia*, Views adopted on 11 July 2006; No. 560/1993, *A. v. Australia*, Views adopted on 3 April 1997, paras. 9.2 and 9.3; No. 305/1988, *Van Alphen v. the Netherlands*, Views adopted on 23 July 1990, para. 5.8; and No. 1324/2004, *Shafiq v. Australia*, Views adopted on 31 October 2006, para. 7.2.

[9] See general comment No. 16 (1988) on article 17 (right to privacy).

[10] This is confirmed by a statement from his trauma counsellor in Australia.

5.5 Having found no impediment to the admissibility of the author's claims under articles 7, 9 and 17 of the Covenant, the Committee proceeds to their examination on the merits.

Consideration of the merits

6.1 The Human Rights Committee has considered the present communication in light of all the information made available to it, as required under article 5, paragraph 1, of the Optional Protocol.

6.2 The Committee notes the author's allegations under article 7 that from 23 to 25 April 2002, he was ill-treated in the premises of the national intelligence service in Lubumbashi by officials who accused him of being a spy. He was subjected to regular beatings and feared he would be killed. The Committee further notes the author's allegations that, during the six months that he was detained at the premises of the national intelligence services in Kinshasa, he was subjected to various brutal forms of torture. It also notes that he was deprived of food and water and that he did not have any contact with his family. Finally, it notes that according to his trauma counsellor, the author suffers long-term consequences of the trauma of his detention and torture, including issues to do with sleep, appetite, somatic pain and interpersonal problems.

6.3 The Committee recalls that the State party has a duty to investigate in good faith all allegations of violations of the Covenant made against it and to furnish to the Committee the information available to it. In cases where the allegations are corroborated by credible evidence submitted by the author and where further clarification depends on information that is solely in the hands of the State party, the Committee may consider an author's allegations to be substantiated in the absence of satisfactory evidence or explanations to the contrary presented by the State party. In the absence of any explanations from the State party, due weight must be given to the author's allegations.[11]

6.4 On the basis of the information at its disposal, and recalling that article 7 allows no limitation, even in situations of public emergency,[12] the Committee finds that the treatment to which the author was subjected by officials of the national intelligence services, with the aim of obtaining a confession of his involvement with the Government of Rwanda and his plan to overthrow the Government of the Democratic Republic of the Congo, reveals a violation of article 7 of the Covenant.

6.5 Regarding article 9 of the Covenant, the Committee notes that the author was arrested on 16 April 2002 by the Presidential Special Police Department, that he was brought before the Court of State Security in July 2002 and that he was held in detention until 4 October 2002. Referring to paragraph 4 of its general comment No. 8 (1982) on article 9 of the Covenant (Right to liberty and security of persons) and to its jurisprudence, the Committee recalls that the notion of "arbitrariness" is not to be equated with "against the law", but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law.[13] This means that remand in custody must not only be lawful, but reasonable and necessary in all the circumstances.

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[11] See communications No. 1761/2008, *Giri v. Nepal*, Views adopted on 24 March 2011, para. 7.4; No. 1295/2004, *El Alwani v. Libyan Arab Jamahiriya*, Views adopted on 11 July 2006, para. 6.5; No. 1422/2005, *El Hassy v. Libyan Arab Jamahiriya*, Views adopted on 24 October 2007, para. 6.2; No. 540/1993, *Basilio Laureano Atachahua v. Peru*, Views adopted on 25 March 1996, para. 8.5; and No. 458/1991, *Mukong v. Cameroon*, Views adopted on 21 July 1994, para. 9.4.

[12] Article 4 of the Covenant and general comment No. 20 (1992) of the Committee on article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment), para. 3.

6.6 The information before the Committee suggests that the author was arrested without a warrant by the Presidential Special Police Department, that he was accused of being a spy for Rwanda and looking to stage a coup against the President. Furthermore, the information before the Committee does not show that formal charges were presented against the author, or that he was informed of the reasons for his arrest, or its legal basis. He was held in detention from 16 April 2002 until July 2002, without access to legal assistance, and he had no contact with his family until his release in October 2002. He was taken to court without prior notice, no evidence was presented against him and he was never convicted of any crime. In the absence of any explanations by the State party on the legality, reasonableness and necessity of the author's detention, the Committee considers that there has been a violation of article 9, paragraph 1.

6.7 It also finds that while being accused of crimes against public security, the absence of any formal charges, information on the grounds for, and legal basis of, the author's arrest and detention reveals a violation of article 9, paragraph 2.

6.8 Moreover, the Committee recalls paragraph 2 of its general comment No. 8 and its jurisprudence,[14] according to which the meaning of the term "promptly" in article 9, paragraph 3, must be determined on a case-by-case basis, but that delays should not exceed a few days. The Committee further recalls that the period of police custody before a detained person is brought before a judge should not exceed 48 hours.[15] Any longer period of delay would require special justification to be compatible with article 9, paragraph 3, of the Covenant.[16] The Committee therefore considers the delay of three months before bringing the author before a judge to be incompatible with the requirement of promptness set forth in article 9, paragraph 3 of the Covenant and thus constitutes a violation thereof.

6.9 Furthermore, the Committee considers that, in the absence of any evidence presented to the author relating to the accusations against him and his having been detained without having access to a lawyer or any contact with his family, effectively prevented him from challenging the legality of his detention before a court and therefore also breaches article 9, paragraph 4.

6.10 Having found a violation of articles 7 and 9 of the Covenant, the Committee will not consider the author's complaint related to the violation of article 17 of the Covenant.

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[13] See communications No. 1134/2002, *Gorji-Dinka v. Cameroon*, Views adopted on 17 March 2005, para. 5.1, and *van Alphen v. Netherlands*, para. 5.8.

[14] The Committee found that, in the absence of any explanations by the State party, a delay of three days in bringing a person before a judge did not meet the requirement of promptness within the meaning of article 9, paragraph 3 (see communication No. 852/1999, *Borisenko v. Hungary*, Views adopted on 14 October 2002, para. 7.4). See also communications No. 1910/2009, *Zhuk v. Belarus*, Views adopted on 30 October 2013, para. 8.3; No. 2120/2011, *Kovaleva and Kozyar v. Belarus*, Views adopted on 29 October 2012, para. 11.3 and No. 1787/2008, *Kovsh v. Belarus*, Views adopted on 27 March 2013, paras. 7.3–7.5.

[15] See communication No. 1592/2007, *Pichugina v. Belarus*, Views adopted on 17 July 2013, para. 7.4.

[16] See *Borisenko v. Hungary*, para. 7.4. See also principle 7 of the Basic Principles on the Role of Lawyers, adopted at the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders (United Nations publication, Sales No. E.91.IV.2).

7. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the information before it discloses violations by the State party of articles 7 and 9 of the Covenant.

8. In accordance with article 2, paragraph 3, of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including by (a) conducting a thorough and effective investigation into his allegations of torture and ill-treatment; (b) prosecuting, bringing to trial and punishing those responsible for the violations committed; and (c) providing adequate compensation and a formal public apology to the author and his family for the violations suffered. The State party should also take steps to prevent similar violations from occurring in the future.

9. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether or not there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when a violation has been established, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views in all official languages.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

V. Communication No. 1898/2009, *Choudhary v. Canada* (Views adopted on 28 October 2013, 109th session)[*]

Submitted by:	Naveed Akram Choudhary (represented by counsel, Stewart Istvanffy)
Alleged victims:	The author, his wife, Safia Naveed, and three of their children (Asma, Saif and Rayan Naveed)
State party:	Canada
Date of communication:	31 August 2009 (initial submission)
Subject matter:	Expulsion to a country where the person fears that he or she will be tortured and persecuted
Procedural issue:	Non-exhaustion of domestic remedies; non-substantiation; and incompatibility with the Covenant
Substantive issues:	Right to life; right to protection from cruel, inhuman or degrading treatment or punishment; right to be free from arbitrary detention; right to protection from arbitrary and unlawful interference with the family and home; protection of the family; right to child protection
Articles of the Covenant:	2, 6, 7, 9, 13, 14, 17, 23 and 24
Article of the Optional Protocol:	2, 3 and 5 (para. 2 (b))

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 28 October 2013,

Having concluded its consideration of communication No. 1898/2009, submitted to the Human Rights Committee by Naveed Akram Choudhary under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

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[*] The following members of the Committee participated in the examination of the present communication: Mr. Yadh Ben Achour, Mr. Lazhari Bouzid, Mr. Ahmad Amin Fathalla, Mr. Cornelis Flinterman, Mr. Walter Kälin, Ms. Zonke Zanele Majodina, Mr. Kheshoe Parsad Matadeen, Mr. Gerald L. Neuman, Sir Nigel Rodley, Mr. Victor Manuel Rodriguez-Rescia, Mr. Fabián Omar Salvioli, Ms. Anja Seibert-Fohr, Mr. Yuval Shany, Mr. Konstantine Vardzelashvili and Ms. Margo Waterval.

The text of a joint dissenting opinion by Committee members Mr. Shany, Ms. Seibert-Fohr, Mr. Vardzelashvili, Mr. Flinterman, Mr. Neuman and Mr. Kälin is appended to the text of the present Views.

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The author of the communication, dated 30 August 2009, is Naveed Akram Choudhary, a Pakistani national born in Pakistan on 26 February 1968. He claims that the State party would violate his rights under articles 6, 7 and 9 of the Covenant were he to be deported to Pakistan and that the procedural guarantees of articles 2, 13 and 14 of the Covenant have been violated through the domestic proceedings. Finally, he claims that his deportation would also entail a violation of his rights as well as the rights of his wife, Safia Naveed Choudhary, a Pakistani citizen, born on 28 August 1972, and three of his children, Asma Naveed, born on 15 September 2002, Saif Naveed, born on 12 October 2003, and Rayan Naveed, born on 23 October 2005, who have Canadian citizenship, under articles 17, 23 and 24 of the Covenant. He is represented by counsel, Stewart Istvanffy.[1]

1.2 On 4 September 2009, pursuant to rule 97 of the Committee's rules of procedure, the Committee, acting through its Special Rapporteur on new communications and interim measures requested the State party not to expel the author and his family while the communication was being examined.

Factual background

2.1 The author is married to Safia Naveed, with whom he has four children, three of whom are Canadian citizens. The author was an active Shia member of the Imam Bargah community in Jhelum, Punjab, who has been targeted by the Sunni extremist group Sipah-e-Sahaba (SSP) for speaking out against Islamist fundamentalism and violence. The city of Jhelum is a stronghold of the SSP.

2.2 The problems began in 1999, when the SSP opened an office in the author's neighbourhood. Between 2000 and 2002, the author was a victim of attacks and threats by SSP members, who also threatened that he and other Shiites would be killed if they continued to organize meetings of "infidels". He complained to the police and to the Office of the Senior Superintendent of Police in Jhelum,[2] but achieved no results. In particular, he and his wife were attacked in March 2001 during a religious gathering. As a result, the author had to be treated at the hospital for the injuries suffered.[3] On 13 February 2002, some SSP supporters shot at him and his fellow Shiites. On another occasion he learned that the SSP had filed a complaint with the police, accusing him of publicly insulting the Sunni faith.[4] He then decided to leave Pakistan.

2.3 The author learned after leaving Pakistan that the complaint issued against him for publicly insulting the Sunni faith had resulted in a criminal charge of blasphemy, and that the police had gone to his house to arrest him. As they did not find him, they issued an arrest warrant against him.[5] The author fled to Canada with his wife via the United States of America in March 2002, and claimed refugee status in Montreal on 15 April 2002.

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[1] The Optional Protocol entered into force for the State party on 19 August 1976.

[2] A copy of the letter to the Senior Superintendent of Jhelum district, dated 14 February 2002, is appended to the author's original communication.

[3] Medical report, dated 10 March 2001, submitted by the author.

[4] A copy of the First Information Report filed by an SSP member on 14 February 2002 is appended to the author's original communication.

[5] A copy of the arrest warrant dated 7 May 2002 is appended to the author's original communication (the arrest warrant was delivered, according to that same document, on 28 June 2002).

2.4 Later, the author claimed that their son who had been left behind in Pakistan had been kidnapped in November 2006 as an act of reprisal against him, and is still missing.[6] A fatwa was also issued against the author by radical Sunnis of Jhelum.

2.5 The Refugee Protection Division of the Immigration and Refugee Board rejected the author's refugee claim on 14 December 2004, on the basis that he and his wife did not credibly establish their identity. The Board found that the author's identity document seemed to be counterfeit, as it did not contain the normal characteristics generally observed in that type of document. As for the identity document presented by his wife, the Board noted that the numbering of the card was part of a list of documents that had been declared stolen by the Government of Pakistan.[7] The Immigration and Refugee Board therefore found that those pieces of evidence put into doubt the validity and authenticity of both cards. It concluded that, in line with the jurisprudence of the Federal Court, when documents tendered by the applicant are found to be fraudulent and no satisfactory explanation is offered, the panel can draw a negative conclusion with regard to the applicant's identity and credibility.[8] The Board concluded that, since neither the author nor his wife had established their identities, they had not established the central element of their claim.

2.6 The Federal Court rejected the author's application for leave for judicial review on 24 March 2005. A request to reopen the case on the basis of additional documentation was rejected on 8 July 2005 by the Immigration and Refugee Board.

2.7 Both the author's demand on humanitarian and compassionate grounds and pre-removal risk assessment (PRRA) were rejected on 28 and 29 May 2007, respectively. The author filed for judicial review of the PRRA decision, which was denied in April 2008.

2.8 The deportation of the author and his family was scheduled for 8 September 2009. A motion for stay of deportation was filed on 31 August 2009 and was still pending before the Federal Court at the time of submission of the communication to the Committee. However, this remedy has no suspensive effect against the order for removal. The author therefore claims that he exhausted domestic remedies.

The complaint

3.1 The author contends that his deportation would entail a violation of articles 6, 7 and 9 of the Covenant. He claims that, in the light of the fatwa and arrest warrant issued against him, his life and personal security would be at great risk if returned to Pakistan. The Sipah-e-Sahaba is one of the most dangerous radical Sunni organizations in Pakistan, over which the Pakistani authorities have no control, and has mistreated the author in the past.

3.2 The author was involved in most of the important religious events of his Imam Bargah and he is well known in the Pakistani Shia community in Montreal. It is therefore impossible for him to hide in his country. The author adds that there is complete impunity in Pakistan for the groups acting against him. Despite compelling evidence by human rights organizations and newspaper articles, the Canadian authorities did not agree that such danger existed.

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[6] Newspaper article submitted.

[7] The report specifies that the serial number of this document is part of a list of blank copies of national identity cards stolen in Peshawar in 1997.

[8] The Board cited the Federal Court's jurisprudence in *Yogorajah v. Canada (Minister of Citizenship and Immigration)* (C.F. 1ère inst., IMM-5722-01), Rouleau, December 20, 2002.

3.3 The PRRA decision did not take into consideration pieces of evidence that he submitted regarding the risk to his life and risk of torture, thereby violating the procedural guarantees prescribed in articles 13 and 14 of the Covenant.

3.4 As to the final decision of the Federal Court, it refers only to the legality of the PRRA decision, not to the danger to his life. The decision does not even mention the newspaper articles and other evidence about the disappearance of the author's eldest son in Pakistan in November 2006. The author submitted several documents, attestations, letters and newspaper articles confirming that he himself has been persecuted in Pakistan and that his life will be in danger if he returns to his country. However, the case was rejected because of a lack of recognition by the Immigration and Refugee Board of the extent of sectarian terrorism in Pakistan and the lack of protection provided by the State in this regard. More importantly, the decision was based mainly on the lack of identity documents.

3.5 The author has strong support from the Shia leadership in his city and in Pakistan, and submitted several letters to the Canadian authorities that confirm the danger he faces. The author alleges that all this evidence has been ignored in the decision refusing his PRRA application. The evidence includes police reports, an arrest warrant, a medical report, a lawyer's letter and corroborating letters from his temple. The author suffers from depression and the children are afraid of being sent back to Pakistan.

3.6 The judicial review by the Federal Court is not an appeal on the merits. Rather, it is a very narrow review for gross errors of law. Leave must be obtained, for which an arguable case must be made, in order for the Federal Court to proceed with this review. In addition, in the context of deportation, it has no suspensive effect. In the author's case, the Federal Court stated that it could not reassess irreparable harm based on the same allegations brought before the Immigration and Refugee Board or the PRRA officer. The author therefore considers the recourse before the Federal Court to be futile.

3.7 The author further considers that PRRA officers do not fulfil the requirements of impartiality, independence and recognized competence in matters of international human rights and legal matters. Their decisions do not always conform to the jurisprudence of the Federal Court or the Immigration and Refugee Board and do not take into account in any realistic fashion the situation in the countries of the people asking for relief.

3.8 On 6 September 2009, the author brought additional claims to the Committee. He argues that the rights of his children, who were born in Canada and have Canadian citizenship, have not been considered in the decisions regarding them, despite substantial evidence of danger and terrible living conditions for them in Pakistan. These children have the right to the protection of the State party without discrimination and the decision to deport their parents does not respect this international obligation. If the children return with their parents, they will be victims of a violation of article 24. In its decision dated 7 April 2008, the Federal Court did not take into account the protection of the family or the consideration of children's rights.

3.9 The author notes that the fact that he and his family have lived in Canada since 2002 was not taken into account by the Canadian authorities. The couple's eldest son was left behind in Pakistan and disappeared in the hands of Islamic extremists in late 2006, as corroborated by newspaper articles and letters from family members submitted to the authorities and now to the Committee.[9] In addition, one of the author's sons required special education that he would not be able to get in Pakistan. The family's return to

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[9] Those documents were submitted in the latest submission for humanitarian and compassionate grounds in July 2008.

Pakistan would be contrary to the best interests of the children and would violate articles 17 and 23 of the Covenant.

State party's observations on the admissibility and the merits

4.1 On 1 March 2010, the State party provided observations on the admissibility and merits of the communication.

4.2 The State party challenges the admissibility of the author's claims under articles 6 and 7 for failure to exhaust domestic remedies since, at the time of writing, the author had a pending application for leave to apply for judicial review before the Federal Court. In addition, the author's allegations are inadmissible for failing to substantiate that he has established a prima facie case. Indeed, the author's allegations before the Committee are based on the same facts and evidence as were presented to the Canadian authorities. It is not the role of the Committee to re-evaluate facts and evidence unless it is manifest that the domestic authorities' evaluation was arbitrary or amounted to a denial of justice. Nothing in the author's communication suggests arbitrariness or denial of justice. Nevertheless, should the Committee decide to re-evaluate the facts and evidence of the case, the State party submits that the author has not established that he would be at personal risk of treatment contrary to the Covenant.

4.3 The author's claims under articles 2, 9, 13 and 14 are inadmissible as incompatible with the Covenant pursuant to article 3 of the Optional Protocol.

4.4 In his written narrative filed in support of his refugee claim, the author stated that, as a Shia involved in religious activities in the city of Jhelum, he arranged a Shia religious gathering in March 2000. Members of the SSP pelted his home with stones and, although the police came, no one was arrested. He began to receive threatening phone calls and other Shia members were harassed and beaten. On 10 March 2001, he and his wife were attacked by the Sunni extremist F.M. and four others; he suffered a nose injury and bruising. In May 2001, the Imam Bargah was attacked by about two dozen Sunnis, who pelted stones at the Shias and threatened to set the building on fire. In February 2002, motorcyclists riding past the Imam Bargah allegedly opened fire on it with guns. The author continued to receive threatening phone calls and therefore went with other Shias to the police to file a complaint. While he, his wife and son were in another village visiting relatives, he was informed that the police had come to his home to arrest him after a Sunni extremist had filed a complaint against him for having publicly insulted the Sunni faith. The family therefore decided to leave the country. An agent could make travel arrangements only for the author and his wife but promised to arrange for their son to join them.

4.5 Before the Immigration and Refugee Board, the author was represented by counsel and gave oral testimony in addition to the documentary evidence submitted. He had the chance to explain any ambiguities or inconsistencies and respond to any questions. The Board determined that the author was not a Convention refugee and not a person in need of protection. It found that the documents establishing the author's identity were fraudulent. The author had been provided with the expert's report concluding that the author's identification document was a counterfeit more than three months before his December 2004 hearing before the Immigration and Refugee Board, but was unable to provide any other documents establishing his identity. He merely insisted that the documents were real. Because the author had not established his identity, which was a central element of his claim, the Board determined that the author was not a refugee. On 24 March 2005, the Federal Court denied the author's application for leave to apply for judicial review of the Board's decision.

4.6 During the PRRA, the author made the same claims as he had before the Immigration and Refugee Board. He added that his son Awais had been kidnapped while visiting his grandparents in Jhelum on 2 November 2006. With respect to the author's identity, the PRRA officer noted that, since the 2004 hearing, the author had obtained computerized identity cards, as well as Pakistani passports for himself and his wife. The PRRA officer relied on the fact that Pakistani authorities did in fact issue a passport to the author as conclusive evidence of identity.

4.7 The PRRA officer, considering the various reports on the human rights situation in Pakistan, noted that sectarian violence affects all minority groups in the country, and that members of the Sunni majority are also victims. In 2005, the Government of Pakistan cracked down on the SSP militants, with many members, including its leader, arrested. The Government has also implemented measures to limit the abuse of blasphemy laws, resulting in a significant reduction of blasphemy cases, the dropping of charges and low conviction rates. With regard to the fatwa issued against the author, the PRRA officer relied upon the documentary evidence which suggested that anyone in Pakistan can purport to issue a fatwa, but only those fatwas issued by a proper body will have any consequence. The PRRA officer did not consider that the barely legible photocopy of the fatwa issued against him and which was provided by the author was sufficient to give the document any probative weight.

4.8 With respect to the alleged kidnapping of the author's son, the PRRA officer did not consider that the newspaper articles mentioning that the son had been missing for six days were sufficient proof. Despite being requested to do so, the author did not inform the officer whether the son was still missing, and as such, the disappearance was given little probative weight in assessing the risk to the author. The officer concluded that the author had failed to establish the presence of a personalized risk. On 9 August 2007, the author applied for leave to apply to the Federal Court for judicial review of the negative PRRA decision. Leave was granted on 20 December 2007. The application was joined with the author's application for judicial review of his negative humanitarian and compassionate grounds ("H&C") decision.

4.9 In the framework of the H&C application, in addition to the claims already made before the Immigration and Refugee Board and PRRA officer, the author alleged that his three Canadian-born children could be in danger at the hands of religious extremists if the family had to return to Pakistan. The author's H&C application was turned down on 28 May 2007 based on the same reasoning followed by the PRRA officer. In addition, the officer considered the author's degree of establishment in Canada and the best interest of the author's children. The officer noted that the author had been unemployed for four years in Canada and that his active participation in religious activities in Montreal was not sufficient to establish that he is well integrated into Canadian society. With respect to the children, the officer determined that because of their young ages the fact that they would be going with their parents to Pakistan, where they are citizens, and the presence of a large family in Pakistan to provide support, the best interest of the children did not warrant an exemption from the normal requirements of the legislation. The officer concluded that the difficulties the family may face upon return are not unusual, undeserved or disproportionate, and as a result, there were insufficient humanitarian and compassionate grounds to exempt the family from the requirement to obtain an immigration visa from outside of Canada.

4.10 After the author's applications for leave to apply for judicial review of both the PRRA and H&C decisions were granted, the Federal Court rendered its decision on 7 April 2008, denying the judicial review applications. The Court considered that the decision taken by the PRRA officer was reasonable, since it was based on a thorough and thoughtful analysis. As for the H&C decision, the Court reiterated that the best interest of the child is one factor among others to be considered by the officer, but this interest does not constitute necessarily the determinative factor acting as an impediment to the removal of the family.

The Court found that the officer was "alive, alert and sensitive" to the best interests of the children, as required by the jurisprudence, and that his findings were reasonable and based on evidence.

4.11 On 23 July 2008, the author submitted a second H&C application based on the same allegations of risk as in previous applications and emphasized the best interest of his Canadian-born children and the unsettled human rights situation in Pakistan. The officer noted that although one of the children required speech therapy, such therapy was available in Pakistan. Moreover, while the education system in Pakistan was not ideal, the children could get a public education until the age of 17, or could attend private schools. In addition, as Canadian citizens, they could choose to return to Canada for their university education. The officer concluded that the children would therefore not suffer hardship if returned with their parents to Pakistan, where they also have an extended family. With regard to the risk, the officer considered the new developments in the human rights situation in Pakistan. The officer noted that sectarian violence continued in Pakistan with members of all religions (Ahmadis, Christians, Hindus, Shiites and Sunnis) being at risk. He considered that the author had not demonstrated a personal risk in this regard. He noted that the author's father, who is also an active Shiite, had been able to remain at the same address for a number of years, apparently without problems. With respect to the kidnapping of the author's son, the officer considered that the letters from friends of the author were from interested parties and had not been submitted to the police or human rights bodies that may have taken action.

4.12 In his submission, the author referred to several human rights organizations, including Amnesty International and Human Rights Watch, which he alleges confirm that there is complete impunity in Pakistan for "religious terrorists and their crimes". The author has not submitted any evidence demonstrating that someone with his profile as a local Shia leader is at particular risk of torture or death in Pakistan. Even if human rights violations continue to be reported, including against Shias, this is not sufficient to be the basis for a violation of the Covenant. In any event, the main reports on the human rights situation in Pakistan do not indicate that Shias are particularly at risk. For instance, a United States of America State Department report notes that most blasphemy allegations are made by Sunni Muslims against other Sunni Muslims. Appellate courts have been dismissing most blasphemy charges and in 2005, a law was passed requiring senior police officers to review blasphemy charges, to eliminate spurious charges. The State party notes that the focus of the author's allegations concerns actions by Sunni extremists in Pakistan and not State authorities.

4.13 Even if the author does face a risk of ill-treatment if he returns to Pakistan, he has not shown that he does not have an internal flight alternative. In particular, the author has not proven that the extremists who allegedly want him dead would search for him outside of his hometown of Jhelum. Even though he may face hardship should he not be able to go back to his home town, such hardship would not amount to a violation of article 7 of the Covenant.

4.14 The State party further argues that the author's claims with respect to articles 2, 9, 13 and 14 are incompatible with the Covenant, or in the alternative, insufficiently substantiated. In accordance with the Committee's jurisprudence, the provisions of article 2 lay down general obligations for States parties and cannot, by themselves and standing alone, give rise to a claim in a communication under the Optional Protocol.[10]

4.15 With respect to article 9, the State party contends that, unlike article 7, article 9 does not have any extraterritorial application as indicated in the Committee's general comment

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[10] The State party refers, inter alia, to the Committee's jurisprudence in communication No. 1234/2003, *P.K. v. Canada*, decision of inadmissibility adopted on 20 March 2007, para. 7.6.

No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant (para. 12).[11] Even if the author could prove that he would be detained upon return to Pakistan, this would not lead to the State party's responsibility under the Covenant. Only the most serious breaches of fundamental rights can constitute exceptions to the power of the State to decide conditions allowing foreigners to enter and remain in its territory. Limiting the power of a State to control who immigrates across its borders by giving extraterritorial reach to all articles of the Covenant would deny a State's sovereignty over removal of foreigners from its territory.

4.16 With respect to article 13, the State party considers the author's claims inadmissible for non-substantiation and incompatibility with the Covenant. In the event that the Committee wishes to consider the application of article 13 on the merits, the State party emphasizes that article 13 reflects the well-established principle of international law that States have the right to control the entry, residence and expulsion of aliens. Article 13 does not grant to non-nationals a broad right to asylum or right to remain in the territory of a State party. The author was allowed to stay in Canada for the purpose of having his refugee claim determined and for the purpose of having his PRRA application assessed. Since it has been determined that the author was not at risk in Pakistan, and because he is subject to a lawful order, he is not lawfully in the territory of Canada. Therefore article 13 does not apply to his case. In addition, article 13 regulates only the procedure and not the substantive grounds for expulsion and its purpose is to prevent arbitrary expulsions. The State party considers that the relevant laws and processes which apply to the question of removal of the author from Canada are fully consistent with these procedural requirements. The author has not established that the proceedings leading to the removal order against him were not in accordance with lawful procedures or that the domestic authorities acted in bad faith or abused their power. In the alternative, the State party contends that the proceedings being challenged satisfy the guarantees contained in article 13. As detailed above, the author had his case heard by an independent tribunal, the Immigration and Refugee Board; he was represented by counsel; had full opportunities to participate and be heard and had access to judicial review.

4.17 As for article 14, the author's claims are unsubstantiated and incompatible with the Covenant, as the author has brought no arguments or evidence in support of his claim. Moreover, in accordance with the Committee's jurisprudence, the immigration proceedings challenged by the author do not fall within the ambit of a "suit at law" and are therefore not encompassed by article 14.[12] In its general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial (para. 17),[13] relating to article 14, the Committee states that this provision does not apply to extradition, expulsion and deportation procedures.

4.18 The State party notes the author's general criticisms of the Canadian determination and post-determination process. With respect to the author's allegation that PRRA officers lack independence, the State party refers the Committee to several decisions of the Federal Court, among them *Say v. Canada*,[14] where the independence of the PRRA decision-makers was considered in detail on the basis of extensive evidence and argument. In addition, contrary to the author's argument that PPRA decisions are taken on the enforcement side of immigration, the PRRA function has, since 2004, been under the authority of the Minister of Citizenship and Immigration, who is responsible for refugee protection and immigration matters. Another Minister, the Minister of Public Safety, is responsible for deportation.

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[11] *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 40*, vol. I (A/59/40 (Vol. I)), annex III.

[12] The State party refers to the Committee's jurisprudence in communications No. 1341/2005, *Zündel v. Canada*, decision of inadmissibility, adopted on 20 March 2007, para. 6.8; and *P.K v. Canada*, paras. 7.4 and 7.5.

[13] *Official Records of the General Assembly, Sixty-second Session, Supplement No. 40*, vol. I (A/62/40 (Vol. I)), annex VI).

[14] *Say v. Canada* (Solicitor General), 2005 FC 739.

4.19 For all the reasons stated above, the State party considers that the author's claims are inadmissible. In the alternative, it finds them to be without merit.

Author's comments on the State party's submission

5.1 On 28 March 2012, the author submitted his comments on the State party's submission, reiterating his allegations regarding the risk for himself and his family in case of return to Pakistan.

5.2 The Immigration and Refugee Board decided on 14 December 2004 that the author and his wife were not Convention refugees, based on the conclusion that they had not established their identity. It is clear from reading the decision that there has been no evaluation of credibility of the author and his wife. The author requested additional time to submit other documents to establish identity or to show that the national identity cards were valid, but this was refused. This decision follows the adoption of section 106 of the Immigration and Refugee Protection Act of June 2002 which mandated closer attention to identity documents. Following the 2002 legislation, the Immigration and Refugee Board became stricter on this issue. Many refugee claims are rejected with no hearing to judge their credibility.

5.3 The author and his wife then presented new computerized national identity cards from Pakistan, which were accepted as establishing their identity. These documents contained the same identity numbers and information as in the national identity cards which were earlier judged to be fraudulent by the Immigration and Refugee Board. After the negative decision of the Board, leave was denied at the Federal Court.

5.4 The author reiterates that both decisions on the humanitarian application and the decision on the PRRA request were abusive and arbitrary in that they did not take into account compelling evidence about the risk faced or the importance of protecting family rights. The author believes that these decisions are very good examples of the ineffective nature of the PRRA recourse. The author refers to a brief presented to the Canadian Standing Committee on Citizenship and Immigration by some NGOs, including Amnesty International,[15] which identifies systemic problems with the PRRA process including: (a) dismissing apparently trustworthy evidence without providing the reasoning for doing so; (b) capricious choices among documentary evidence; (c) failure to independently consider credibility once the Immigration and Refugee Board has made a negative finding; and (d) raising of the evidentiary threshold far beyond that required by the law and jurisprudence. The report concludes to the absence of accountability of PRRA officers, their lack of institutional independence and a lack of transparency as to qualifications and training of PRRA officers.

5.5 With regard to the judicial review, the author considers that there is real reluctance on the part of the Canadian authorities to correct very clear mistakes. There is no mention in the Federal Court's decision of 7 April 2008 of the disappearance of the author's son. In addition, two questions were proposed for certification; one regarding the question of protection of family life and the other regarding the proper criteria for risk review. Neither was certified and there is no possibility of appeal without certification.[16]

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[15] The author submits a document entitled: "The Pre-Removal Risk Assessment in Canada, Brief presented to the Standing Committee on Citizenship and Immigration, House of Commons, Ottawa by Amnesty International, Section canadienne francophone, La Table de concertation des organismes au service des personnes réfugiées et immigrantes, Le Centre Justice et Foi, February 13, 2007".

5.6 In mid-2009, the author and his family were called to prepare for deportation, which was set for 8 September 2009. A written request was made to defer the deportation to allow time for the examination of the second humanitarian application. This was refused at the end of June 2009. An application for judicial review was made and a substantial memorandum was submitted with a motion to stay the deportation. This was heard on 31 August 2009; it was refused on 5 September 2009 on the basis that there was no serious question in law, which the author considers abusive given the serious risk alleged. The author argues that it has become much more difficult to obtain stays of deportation, to the extent that many lawyers no longer wish to pursue this recourse because it has little chance of success. The Federal Court has raised the threshold of what is an arguable case for the issuance of an order to stay deportation to a level that is permitting clear violations of the State party's international obligations.

5.7 The author maintains that at the time of writing all domestic remedies had been exhausted, with the second humanitarian application being denied late in September 2009 and the request for judicial review rejected in March 2010.

5.8 The author's family has suffered a number of health problems due to their unstable situation. The author became partially paralysed at one point in late 2009 and the children have had long-term follow-up from organizations for victims of torture in Montreal and from social services.[17]

5.9 With regard to the allegations under articles 6 and 7, the author reiterates that much evidence on the risk upon return was brought to the attention of the domestic authorities, including a letter from the president of the family's Imam Bargah, dated 3 July 2002, which outlines the main facts of persecution against the author before he left; a detailed medical report related to the attack against the author on 10 March 2001; a copy of the collective application to the Senior Superintendent of Police for protection, dated 13 February 2002; and a copy of the First Information Report filed against him by the radical imam on the following day from their visit to the police. There is no reason to doubt the veracity of any of those documents. At the time of the PRRA and H&C applications, more evidence of persecution was provided, such as information regarding the fatwa brought against the author and the information related to the disappearance of his son.

5.10 The author states that, in March 2009, the family received a call-in notice from the immigration authorities and they presented themselves as required. At that time, a removals officer detained both parents and the three Canadian children, alleging the lack of response to a letter sent by the administration. The author and his wife were then released on bail along with the children. The author considers that this detention at the Laval detention centre (a holding centre for migrants north of Montreal), which lasted several days, was not justified and profoundly traumatized the children.

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[16] According to the information on file, the Federal Court refused to certify question 1 because it was not a new question and had already been determined by the Federal Court of Appeal and the Supreme Court of Canada; the Court refused to certify question 2 as the general situation in Pakistan and the presence of personal risk had been considered by the PRRA officer. Furthermore, question 2 raised factual issues that did not transcend the applicants' interest nor constitute an issue of broad significance or general application that should lead to a certification pursuant to the criteria set forth in earlier jurisprudence of the Federal Court.

[17] The author does not provide further details to support his allegation.

Additional observations by the parties

6.1 On 1 March 2013, the State party submitted that the author's counsel makes false and misleading assertions about the Canadian refugee determination process. Based on the evidence before it, the Federal Court found that the author had not raised a serious issue and that he had not established irreparable harm. The Court also found that the best interest of the children had already been considered in the first H&C decision.

6.2 While the State party notes that the author makes general criticisms of the asylum process, which are not justified, it adds that those allegations were never raised before domestic authorities, notably before the Federal Court.

6.3 With regard to the author's detention with his family for a short period of time in March 2009, the State party notes that the author has not taken issue with any aspect of this detention in any domestic proceedings before or after the introduction of his communication to the Committee. This allegation is therefore inadmissible for non-exhaustion of domestic remedies pursuant to article 5, paragraph 2 (b), of the Optional Protocol. The State party insists that the children were never detained, contrary to the author's assertion. The children were placed in the holding centre with the author at his own request and with a view to avoiding the separation of the family.

6.4 The State party notes that on 19 December 2011, the author made a third application for permanent residence on the basis of humanitarian and compassionate grounds. No decision on that application had been made at the time of the State party's additional observations.

6.5 On 10 May 2013, the State party added that the author's deportation would not interfere with his family life, as Canada has taken no steps to separate the members of the family. The State party is not preventing the children from accompanying their parents to Pakistan where the family can continue to live together. The children, as Canadian citizens, are authorized to remain in Canada; the decision as to whether the children would accompany the parents to Pakistan or remain in Canada is purely the parents' decision, not the result of the State party's decision and therefore does not amount to interference. In addition, the author's removal is justified, lawful and reasonable and proportionate. In its jurisprudence, the Committee has considered that the birth of a child who receives citizenship at birth or at a later time is insufficient by itself to make the proposed deportation of his parents arbitrary.

6.6 In the author's case, humanitarian factors, which included family considerations both in Canada and Pakistan, were carefully considered during the author's first two H&C applications, as described by the State party. The author and his wife came to Canada and had three children there, knowing that they might be required to leave if their asylum claim was rejected. The author's ability to stay in Canada was prolonged only by the remedies afforded to him under Canadian law.

6.7 The State party submits that the author's allegation under article 24 is in fact related to the alleged risk of violence faced by the children in Pakistan by fundamentalist militants, which is an issue more appropriately dealt with under articles 6 and 7 of the Covenant and for which the State party refers to its observations of 1 March 2013. With respect to the specific allegation that the best interest of the author's children was not taken into sufficient consideration, the State party notes that the Immigration and Refugee Protection Act expressly requires that decisions be made taking into account the best interests of a child directly affected, which has been the case in the present communication.

7.1 On 21 July 2013, the author added that the last two years in Pakistan have been the most serious years of violence against Shias in 20 years and there are systematic, massive and flagrant human rights abuses with impunity against religious minorities. The author considers that the evidence provided to the Canadian authorities points to the serious risk faced by the author and his family in case of return to Pakistan.

7.2 The author stresses that currently there is no effective remedy in Canada, since the PRRA procedure is an administrative recourse and the judicial review is weak, as it only controls the legality of decisions. The treatment of his case shows the unwillingness of the authorities to provide for a way to correct mistakes, even with respect to life and death questions such as those faced by the author, who is a victim of what he considers one of the worst terrorist groups in the world. The author does not understand why this crucial point has been given no importance at all. Therefore, contrary to the State party's assertion, the author's claims are sufficiently substantiated.

7.3 The author refutes the State party's contention according to which he has tried to mislead the Committee about the Canadian refugee determination process. The author maintains his opinion about the strict legal analysis performed for stays of deportations. He also maintains that PPRA officers are not applying the correct legal standard in law.

7.4 As to the detention of the author and his family, the author reiterates that there was no justification for his children to be detained, which involved trauma for them.

Issues and proceedings before the Committee

Consideration of admissibility

8.1 Before considering any claims contained in a communication, the Human Rights Committee must decide, in accordance with rule 93 of its rules of procedure, whether the communication is admissible under the Optional Protocol to the Covenant.

8.2 The Committee notes, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the same matter is not being examined under any other procedure of international investigation or settlement.

8.3 The Committee notes the numerous applications of different nature made by the author to prevent his deportation to Pakistan, and particularly a third humanitarian and compassionate grounds (H&C) application. The Committee recalls its jurisprudence to the effect that authors must avail themselves of all judicial remedies in order to fulfil the requirement of article 5, paragraph 2 (b), of the Optional Protocol, insofar as such remedies appear to be effective in the given case, and are de facto available to them.[18] The Committee observes that the pending H&C application does not shield the author from deportation to Pakistan, and therefore cannot be described as offering him an effective remedy. Therefore, the Committee considers that it is not precluded by the requirements of article 5, paragraph 2 (b), of the Optional Protocol from examining the main claims of the present communication. With regard to the author's subsequent allegations related to his detention and the alleged detention of his children for several days in March 2009, the Committee notes that the author has not challenged such detention and the treatment allegedly suffered before domestic courts. The Committee therefore considers this part of the communication to be inadmissible pursuant to article 5, paragraph 2 (b), of the Optional Protocol.

8.4 With respect to the author's claim that the State party has breached its obligation, pursuant to articles 2, 13 and 14 of the Covenant, to provide for an effective remedy to contest the author's expulsion, the Committee considers that these issues are intimately linked to the merits of the case. The Committee therefore finds that the claims have been sufficiently substantiated for purposes of admissibility.

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[18] See communications No. 1959/2010, *Warsame v. Canada*, Views adopted on 21 July 2011, para. 7.4; No. 1003/2001, *P.L. v. Germany*, decision of inadmissibility adopted on 22 October 2003, para. 6.5; and No. 433/1990, *A.P.A. v. Spain*, decision of inadmissibility adopted on 25 March 1994, para. 6.2.

8.5 With regard to the author's allegations of a violation of his family's rights under articles 17 and 23, the Committee notes that those allegations remain general and that, given the age of the children (8, 10 and 11 years old), it is not envisaged that the family will be separated. Accordingly, the Committee considers that the author has not substantiated his claims under these provisions and concludes that this part of the communication is inadmissible pursuant to article 2 of the Optional Protocol.

8.6 With regard to the author's claims under article 24 related to the fate of his children upon return to Pakistan, the Committee considers that the author has not sufficiently substantiated, for the purpose of admissibility, that the education of his children would be disrupted in Pakistan and that the special needs of one of the children cannot be met in that country. Accordingly, the Committee considers this claim to be inadmissible under article 2 of the Optional Protocol.

8.7 With regard to the author's claims under articles 6 (para. 1) and 7 of the Covenant, the Committee notes that the author has explained the reasons why he feared to be returned to Pakistan, based mainly on the alleged fatwa and arrest warrant issued against him and the past harassment and attacks by the Sipah-e-Sahaba (SSP). The Committee also notes that the author has provided documentary evidence in support of such claims, which should be considered on the merits. The Committee accordingly finds the author's claims under articles 6 (para. 1) and 7 admissible pursuant to article 2 of the Optional Protocol.

8.8 With regard to the author's claims under article 9, paragraph 1, the Committee notes the State party's argument that its non-refoulement obligations do not extend to a potential breach of this provision. The Committee takes note of the author's allegations that because of the fatwa issued against him, the First Information Report filed with the police and the subsequent arrest warrant issued in 2002, he would be at risk of arbitrary detention upon return. The Committee considers that, in the context of the present communication, these claims cannot be dissociated from those under articles 6 and 7 of the Covenant and, therefore, the Committee will not examine them separately from the latter.

8.9 The Committee therefore declares the communication admissible in so far as it appears to raise issues under articles 2, 6 (para. 1), 7, 9 (para. 1), 13 and 14 of the Covenant, and proceeds to their consideration on the merits.

Consideration of the merits

9.1 The Human Rights Committee has considered this communication in the light of all the information received, in accordance with article 5, paragraph 1, of the Optional Protocol.

9.2 The Committee recalls its general comment No. 31, in which it refers to the obligation of States parties not to extradite, deport, expel or otherwise remove a person from their territory where there are substantial grounds for believing that there is a risk of irreparable harm (para. 12). The Committee also recalls that, generally speaking, it is for the organs of States parties to the Covenant to review or evaluate facts and evidence in order to determine whether such a risk exists.[19]

9.3 The Committee notes the author's claims that between 2000 and 2002 he was a victim of violent attacks by members of the SSP; that a medical report attests to the injuries he suffered following an attack in March 2001; that a fatwa was issued against him by the SSP and that following a First Information Report filed by one of the group's members to the police, the latter issued an arrest warrant against the author for blasphemy in May 2002. The Committee also notes the author's claim that in 2006, the author's son who remained in Pakistan disappeared.

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[19] Communication No. 1819/2008, *A.A. v. Canada*, decision of inadmissibility adopted on 31 October 2011, para. 7.8.

9.4 The Committee also notes the author's claim that the Immigration and Refugee Board rejected his refugee claim on 14 December 2004 based on his failure to establish his identity; that the Federal Court in turn rejected the author's application for leave for judicial review on 24 March 2005; and that a request to reopen the case on the basis of additional documentation was rejected by the Immigration and Refugee Board on 8 July 2005. The Committee also notes the author's argument that the Board has not assessed the substantive credibility of his refugee claim.

9.5 The Committee takes note of the State party's contention that the author's claims have been thoroughly assessed by the Canadian authorities, including through the Immigration and Refugee Board, the PRRA assessment and the H&C procedure, and that no arbitrariness or denial of justice stems from the asylum process. The Committee takes note of the State party's contention that the author was represented by counsel during the procedure before the Immigration and Refugee Board and gave oral testimony in addition to the documentary evidence submitted; that he was given three months to prepare for the Board hearing and did not use such time to provide other evidence establishing his identity. With regard to the personal risk, the Committee notes the State party's contention that sectarian violence in Pakistan affects all minority groups in the country; that measures taken with regard to the implementation of blasphemy laws had an impact on dropping charges on that basis; that the documents submitted during the asylum procedure were not of sufficient probatory nature; that the author did not update the Canadian authorities on the alleged kidnapping of his son, which affected the credibility of his claim; and that the author had not provided documentary evidence that someone with his profile, as a local Shia leader, would be at particular risk of torture or death in Pakistan.

9.6 The Committee observes that, because of his apparent failure to establish his identity at the initial stage of the procedure, the author was not given any further opportunity, in the framework of the Immigration and Refugee Board, to have his refugee claim assessed, even though his identity was later confirmed. While the author's claim that he faced a risk of being tortured and suffering threats to his life was assessed during the PRRA procedure, such limited assessment cannot replace the thorough assessment which should have been performed by the Immigration and Refugee Board. Notwithstanding the deference given to the immigration authorities to appreciate the evidence before them, the Committee considers that further analysis should have been carried out in this case.[20]

9.7 In this regard, the Committee notes that recent reports point to the fact that religious minorities, including Shias, continue to face fierce persecution and insecurity; that the Pakistani authorities are unable, or unwilling, to protect them; that the Government of Pakistan has dropped a proposed amendment to section 295(C) of the Criminal Code (i.e. the blasphemy law);[21] and that there has been an upsurge of blasphemy cases in 2012.

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[20] Communication No. 1763/2008, *Pillai et al. v. Canada*, Views adopted on 25 March 2011, para. 11.4.

[21] Information provided by non-governmental stakeholders in the context of the examination of Pakistan before the universal periodic review mechanism, which took place on 30 October 2012, also pointed to the fact that "religious discrimination, harassment and attacks on minorities continue[d] unabated, and with impunity" (A/HRC/WG.6/14/PAK/3, para. 49). It was also reported that since the last consideration of Pakistan under the universal periodic review, "blasphemy laws [had] increasingly been used to persecute religious minorities and have been a pretext for growing religious extremism

9.8 In the light of the situation prevailing in Pakistan, due weight must be given to the author's allegations. In this context, the Committee has taken note of the allegations that a fatwa had been issued against the author and a First Information Report had been filed against him under the blasphemy law, and that blasphemy charges incur the death penalty under the criminal law of Pakistan. While death sentences have reportedly not been carried out, several instances of extrajudicial assassination, by private actors, of members of religious minorities accused under the blasphemy law have been reported, without the Pakistani authorities being willing, or able, to protect them. The Committee therefore considers, in the circumstances, that the expulsion of the author and his family would constitute a violation of articles 6 (para. 1) and 7 of the Covenant, read in conjunction with article 2, paragraph 3, of the Covenant.

9.9 Having reached the above conclusion, the Committee decides not to separately examine the author's claims under articles 9 (para. 1), 13 and 14 of the Covenant.

10. In the light of the above, the Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the removal of the author and his family to Pakistan would, if implemented, violate their rights under articles 6 (para. 1) and 7, read in conjunction with article 2, paragraph 3, of the Covenant.

11. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author and his family with an effective remedy, including a full reconsideration of the author's claim regarding the risk he would face should he be returned to Pakistan, taking into account the State party's obligations under the Covenant.

12. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether or not there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when a violation has been established, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views in the official languages of the State party.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

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and vigilantism" (ibid.). Several non-governmental organizations expressed concern over the number of reported cases and deaths following blasphemy accusations, and instances of individuals accused of blasphemy — even if found innocent — being murdered by vigilantes (ibid.). Others similarly reported an increase in violent attacks on minorities and religious groups such as Christians, Ahamadis and Shia Muslims, as well as an increase in hate speech propagated by extremists and militant religious groups (ibid., para. 73). Many recommendations formulated by States concerned the urgent need to repeal the blasphemy laws (see A/HRC/22/12).

Appendix

Individual opinion of Committee members Mr. Yuval Shany, Ms. Anja Seibert-Fohr, Mr. Konstantine Vardzelashvili, Mr. Cornelis Flinterman, Mr. Gerald L. Neuman and Mr. Walter Kälin (dissenting)

1. We are unable to agree with the decision rendered by the Committee to find that the State party's decision to deport the author back to Pakistan amounts to a violation of articles 6 (para. 1) and 7 of the Covenant read in conjunction with article 2 (para. 3) of the Covenant, for the following reasons.

2. According to the Committee's established jurisprudence, it should accord deference to fact-based assessments by national immigration authorities as to whether removed individuals would face a real risk of a serious human rights violation upon removal, since "it is generally for the instances of the States parties to the Covenant to evaluate facts in such cases".[a] Such an approach is based on acceptance by the Committee of the comparative advantage that domestic authorities have in making factual findings due to their direct access to oral testimonies and other materials presented in legal proceedings at the national level. It is also based on the view that the Committee should not re-evaluate de novo facts and evidence already reviewed by domestic legal institutions.

3. Consequently, the Committee held in the past that it would regard decisions of local immigration authorities as violating the Covenant where the author was able to point to substantial irregularities in the decision-making procedures, or where the final decision was manifestly unreasonable or arbitrary in nature because inadequate consideration was given in domestic proceedings to the specific rights of the author under the Covenant or available evidence not taken properly into account.[b] For example, the Committee found violations of the Covenant where the local authorities failed to consider an important risk factor.[c] It also found violations where the author was able to show on the basis of uncontested evidence that upon removal he would be exposed to a real personal risk of irreparable harm.[d]

4. The author had access to judicial and administrative instances in Canada, which fully heard and considered his claim of a real risk of irreparable harm upon removal to Pakistan. All the risk factors cited by the author — the Fatwa issued against him, the alleged disappearance of his son, and the First Information Report filed against him for allegedly violating Pakistani blasphemy laws — were duly considered by Canadian pre-removal risk assessment and humanitarian and compassionate grounds applications officers, as well as by the Canadian Federal Court, which reviewed their decisions. On the basis of all the information before them, the Canadian authorities came to the conclusion that the author's version of the events that he claimed happened to him in Pakistan before

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[a] Communication No. 1763/2008, *Pillai v. Canada*, Views adopted on 25 March 2011, para. 11.2.

[b] See, for example, communication No. 1544/2007, *Hamida v. Canada*, Views adopted on 18 March 2010, paras. 8.4–8.6.

[c] *Pillai v. Canada*, para. 11.4 ("The Committee further notes that the diagnosis of Mr. Pillai's post-traumatic stress disorder led the [Immigration and Refugee Board] to refrain from questioning him about his earlier alleged torture in detention. The Committee is accordingly of the view that the material before it suggests that insufficient weight was given to the authors' allegations of torture and the real risk they might face if deported to their country of origin, in the light of the documented prevalence of torture in Sri Lanka.").

[d] *Hamida v. Canada*, para. 8.7.

leaving that country are unsubstantiated and that, in general, members of the Shia group in Pakistan are not subject today to a particular risk of physical harm.

5. We are not persuaded that the decision of the Canadian authorities was manifestly unreasonable or arbitrary in nature. There is nothing in the record to suggest that the relevant risk factors were not duly considered by the administrative and judicial instances that reviewed the author's case. Moreover, the version of events provided by the author to the Canadian authorities contained a number of unsubstantiated claims – in particular relating to the kidnapping of his son. Therefore, we cannot hold that the sceptical approach taken by the Canadian authorities towards key factual aspects of the author's claim that his personal circumstances are such that he will face a real risk of irreparable harm upon his return to Pakistan was manifestly unreasonable or arbitrary.

6. We also find no grounds in the evidence before us to reject the factual risk assessment made by the Canadian authorities, according to which, in general, members of the Shia community in Pakistan are not subject today to a particular risk of physical harm. Under these circumstances, in which both the specific and general factual risk factors invoked by the author were thoroughly examined and rejected by legal authorities in the State party, we cannot hold on the basis of the evidence before us that the author proved that upon removal he would be exposed to a real personal risk of irreparable harm.

7. Finally, we are not persuaded by the majority view that the procedure applied in the author's case suffered from a substantial defect. Though the Canadian authorities decided not to reopen Immigration and Refugee Board proceedings after the identity of the author was positively established, the author's alleged risk of torture and/or persecution or threat to his life and the supporting documents have been assessed in the context of the PRRA procedure, before the Federal Court and in the two decided H&C applications.

8. As a result of these considerations, we are of the view that the author has failed to substantiate his claim that the decision of the State party to deport him to Pakistan would violate articles 6 (para. 1) and 7 of the Covenant read in conjunction with article 2, paragraph 3, of the Covenant and accordingly find no violation of the Covenant by Canada.

[Done in English only. Subsequently to be issued also in Arabic, Chinese, French, Russian and Spanish as part of the present report.]

W. Communication No. 1899/2009, *Terafi v. Algeria* (Views adopted on 21 March 2014, 110th session)*

Submitted by:	Zineb Terafi (represented by the Collectif des familles de disparu(e)s en Algérie (Collective of Families of the Disappeared in Algeria)
Alleged victims:	Ali Lakhdar-Chaouch (the author's son) and the author herself
State party:	Algeria
Date of communication:	26 June 2009 (initial submission)
Subject matter:	Enforced disappearance
Procedural issue:	Exhaustion of domestic remedies
Substantive issues:	Prohibition of torture and cruel or inhuman treatment, right to liberty and security of person, recognition as a person before the law and right to an effective remedy
Articles of the Covenant:	Articles 2 (para. 3), 7, 9 and 16
Article of the Optional Protocol:	Article 5 (para. 2 (b))

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 21 March 2014,

Having concluded its consideration of communication No. 1899/2009, submitted to the Human Rights Committee by Zineb Terafi under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The author of the communication is Zineb Terafi (married name: Lakhdar-Chaouch). She claims that her son, Ali Lakhdar-Chaouch, an Algerian national born on 4 March 1970, is the victim of violations by the State party of articles 2 (para. 3), 7, 9 and 16 of the International Covenant on Civil and Political Rights. She also considers herself to be the victim of violations by the State party of articles 2 (para. 3) and 7 of the Covenant.[1] The author is represented by counsel.

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* The following members of the Committee participated in the examination of the present communication: Mr. Yadh Ben Achour, Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Walter Kälin, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Gerald L. Neuman, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabián Omar Salvioli, Mr. Marat Sarsembayev, Mr. Krister Thelin and Ms. Margo Waterval.

[1] The Optional Protocol entered into force for the State party on 12 December 1989.

1.2 On 10 May 2010, the Committee, acting through its Special Rapporteur on new communications and interim measures, decided not to consider the admissibility and the merits of the case separately.

The facts as submitted by the author

2.1 On 1 April 1997, at 1 a.m., Ali Lakhdar-Chaouch, a 27-year-old orthopaedic surgeon, was arrested at his place of work, the university hospital in Kouba, while he was on duty in the emergency unit. Military security officers in civilian clothes from the Ben Aknoun Territorial Centre for Research and Investigation reportedly arrived at the hospital with an arrest warrant for Mr. Lakhdar-Chaouch. The victim's arrest took place in the presence of many witnesses, including the director of the hospital, the director of the central Algiers hospitals, the head of personnel and many nurses. The hospital director tried to obstruct the arrest, but the security officers informed her that they merely wanted to ask Mr. Lakhdar-Chaouch a few questions and that they would not hold him for long. They subsequently took him away in an unmarked white car. His family has had no news of him since.

2.2 Since 1997, the author has continued to make inquiries and file complaints in an effort to trace her son. She has visited police stations and gendarmeries in Algiers, where she was told that her son was not being detained. In July 1997, the author filed a first complaint with the El Harrach court; the complaint was subsequently dismissed. On 5 March 2000, by order of the prosecutor of the Hussein-Dey court, and following a report from the Baraki gendarmerie, a request was filed to open an investigation into a complaint against a person or persons unknown for enforced disappearance. The victim's father was interviewed by the prosecutor on 15 March 2000. The author subsequently filed a complaint with the Hussein-Dey court against the State party's agents. However, on 24 December 2000, the investigating judge dismissed the case on procedural grounds because the persons responsible for the arrest could not be identified. The witnesses should have been summoned and examined, but the author states that the hospital staff refused to testify for fear of reprisals.

2.3 On 12 February 2001, the author appealed the ruling on behalf of the Lakhdar-Chaouch family on the grounds that those responsible for the arrest could be identified and that the hospital director could be called on to testify. On 13 February 2001, the Indictments Division of the Algiers Court of Appeal granted the appeal and overturned the dismissal of 24 December 2000. The case was returned to the investigating judge, who again dismissed it on 17 November 2003, despite the testimony of the director of the hospital dated 19 January 2003. The author appealed this ruling before the Algiers Court of Appeal. On 21 April 2004, the Court granted the appeal and sent the case back to the investigating judge, who confirmed the dismissal on 15 August 2004.

2.4 On 2 July 2006, the author obtained a certificate of disappearance, issued by the gendarmerie in Baraki. Dissatisfied with this mere noting of the disappearance, she lodged a complaint with the public prosecutor of the Hussein-Dey court. She was subsequently notified on 8 February 2007 by the Baraki criminal investigation police that the certificate had been issued following a thorough investigation.

2.5 As regards administrative remedies and appeals to international bodies, on 30 June 1997, the author filed a complaint with the National Observatory for Human Rights requesting it to ascertain her son's fate. The National Advisory Commission for the Promotion and Protection of Human Rights, which replaced the Observatory, took more than three years to acknowledge receipt of the complaint and finally informed the family that it would initiate an investigation. To date, the family has received no news from the Commission. The author has written repeatedly to the Algerian authorities about her son's disappearance. Letters were sent to the President of the Republic in 1997 and then in 2003.

In January 2003, the author also wrote to the Minister of Justice, the Minister of the Interior and the Prime Minister, but she has never received a reply. The victim's family has contacted foreign non-governmental organizations such as the International Federation for Human Rights (FIDH) and Amnesty International. Furthermore, the author has submitted her son's case to the United Nations Working Group on Enforced or Involuntary Disappearances, but it has never been clarified.

2.6 The author further states that the Charter for Peace and National Reconciliation and its implementing legislation now prevent any recourse to justice in Algeria. Ordinance No. 06-01 precludes any possibility of legal action against State officials, since article 45 establishes the inadmissibility of any proceedings, individual or joint, against members of any branch of the defence and security forces for actions undertaken to protect persons and property, safeguard the nation and preserve the country's institutions. Under the Ordinance, "any allegation or complaint shall be declared inadmissible by the competent judicial authority".

The complaint

3.1 The author considers that her son's disappearance over 12 years ago[2] constitutes enforced disappearance in violation of articles 2 (para. 3), 7, 9 and 16 of the International Covenant on Civil and Political Rights. She also considers herself to be the victim of violations by the State party of articles 2 (para. 3) and 7 of the Covenant.

3.2 According to the Committee's jurisprudence, under article 2, paragraph 3, of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including a thorough and effective investigation into the disappearance and fate of the author's son, his immediate release if he is still alive, adequate information resulting from its investigation, and adequate compensation for the author and her family for the violations suffered by the author's son. The State party is also under a duty to prosecute criminally, try and punish those held responsible for such violations. The State party is furthermore under an obligation to take measures to prevent similar violations in the future.[3]

3.3 The author maintains that, according to the Committee's jurisprudence,[4] the mere fact that the victim had been subjected to enforced disappearance constitutes inhuman or degrading treatment within the meaning of article 7 of the Covenant. Moreover, her son's disappearance of several years is a painful and distressing experience for her, as his mother. She has no idea of what has become of him and is all the more worried because her son is diabetic and may not have been receiving the necessary treatment. Given the victim's absence and the passage of time, her hope of seeing him again fades every day, causing her moral suffering such as to constitute a violation of article 7 of the Covenant also with regard to herself.

3.4 The author recalls the Committee's settled jurisprudence[5] whereby any unacknowledged detention of a person constitutes a complete negation of the right to liberty and security guaranteed under article 9 of the Covenant. The fact that the victim's arrest on

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[2] At the time that this communication was submitted to the Committee (i.e., nearly 17 years ago now).

[3] Communication No. 1196/2003, *Boucherf v. Algeria*, Views adopted on 30 March 2006, para. 11.

[4] See, for example, communications No. 542/1993, *N'Goya v. Zaire*, Views adopted on 25 March 1996; No. 449/1991, *Mojica v. Dominican Republic*, Views adopted on 15 July 1994; and No. 540/1993, *Laureano Atachahua v. Peru*, Views adopted on 25 March 1996.

[5] See, for example, communications No. 612/1995, *Vicente et al. v. Colombia*, Views adopted on 29 July 1997; *N'Goya v. Zaire*; *Laureano Atachahua v. Peru*; and No. 563/1993, *Andreu v. Colombia*, Views adopted on 27 October 1995.

1 April 1997 by the Ben Aknoun military security forces has not been acknowledged, that his detention is not mentioned in the police custody registers and that there has been no real and effective investigation constitutes a violation by the State party of article 9.

3.5 The author also contends that the victim has been deprived of the capacity to exercise his rights and to have recourse to any remedy. The victim has thus been removed from the protection of the law, and the State party's refusal to recognize him as a person before the law is a violation of article 16 of the Covenant.

3.6 The Lakhdar-Chaouch family has never ceased to contact the Algerian authorities in order to ascertain what has become of their son since his disappearance. In the absence of thorough investigations into the alleged human rights violations, the State party has violated articles 7, 9, 16 and 2 (para. 3) of the Covenant.

State party's observations on admissibility

4.1 On 3 May 2010, the State party contested the admissibility of the communication. It is of the view that the communication, which incriminates public officials or persons acting on behalf of public authorities, in cases of enforced disappearance during the period in question — from 1993 to 1998 — should be considered within the broader context of the sociopolitical situation and should be declared inadmissible. The individual focus in this complaint does not reflect the national sociopolitical and security context in which the alleged events are said to have occurred and does not reflect the actual nature or the factual diversity of the situations covered by the generic term "enforced disappearance" during the period in question.

4.2 In this respect, and contrary to the theories propounded by international NGOs, which the State party views as not being very objective, the painful ordeal of terrorism that the State party experienced cannot be seen as a civil war between two opposing camps; rather, it was a crisis that led to the spread of terrorism following calls for civil disobedience. This in turn led to the emergence of a multitude of armed groups that engaged in terrorist crimes, acts of subversion, the destruction and sabotage of public infrastructure, and acts of terror targeting the civilian population. In the 1990s, as a result, the State party went through one of the most terrible ordeals of its young life as an independent country. In this context, and in accordance with the Algerian Constitution (arts. 87 and 91), precautionary measures were implemented, and the Algerian Government informed the Secretariat of the United Nations of its declaration of a state of emergency, in accordance with article 4, paragraph 3, of the Covenant.

4.3 During this period, terrorist attacks were a daily occurrence in the country; they were carried out by a host of ideologically driven armed groups with little in the way of hierarchy, which severely diminished the ability of the authorities to control the security situation. Hence there was some confusion in the manner in which a number of operations were carried out among the civilian population, and it was difficult for civilians to distinguish between the actions of terrorist groups and those of the security forces, to whom civilians often attributed enforced disappearances. According to a variety of independent sources, including the press and human rights organizations, the concept of disappearance in Algeria during the period in question encompasses six possible scenarios, none of which can be blamed on the State. The first scenario cited by the State party concerns persons reported missing by their relatives but who in fact had chosen to go into hiding in order to join an armed group and who instructed their families to report that they had been arrested by the security services as a way of "covering their tracks" and avoiding being "harassed" by the police. The second scenario concerns persons who were reported missing after their arrest by the security services but who took advantage of their subsequent release to go into hiding. The third scenario concerns persons abducted by armed groups which, because they were not identified or because they had stolen uniforms or identification documents from police officers or soldiers, were mistakenly thought to belong to the Armed Forces or security services. The fourth scenario concerns persons reported missing who had abandoned their families, and sometimes even left the country, to escape from personal problems or family disputes. The fifth scenario concerns persons reported missing by their family but who were in fact wanted terrorists who had been killed and buried in the maquis following factional infighting, doctrinal disputes or arguments over the spoils of war among rival armed groups. Lastly, the sixth scenario mentioned by the State party concerns persons reported missing who were actually living in Algeria or abroad under a false identity provided by a network of document forgers.

4.4 The State party maintains that it was in view of the diversity and complexity of the situations encompassed by the general concept of disappearance that the Algerian legislature, following the referendum on the Charter for Peace and National Reconciliation, recommended a comprehensive approach to the issue of disappeared persons, taking account of all persons who had disappeared in the context of the "national tragedy", and under which all victims would be offered support to overcome their ordeal and all victims of disappearance and their beneficiaries would be entitled to redress. According to statistics from the Ministry of the Interior, 8,023 cases of disappearance have been reported, 6,774 examined, 5,704 approved for compensation and 934 rejected, with 136 still pending. A total of 371,459,390 Algerian dinars has been paid out as compensation to all the victims concerned. In addition, a total of 1,320,824,683 dinars has been paid out in monthly pensions.

4.5 The State party further argues that not all domestic remedies have been exhausted. It stresses the importance of distinguishing between simple formalities involving the political or administrative authorities, non-judicial remedies pursued through advisory or mediation bodies, and judicial remedies pursued through the relevant courts of law. The State party observes that, as may be seen from the author's statements, the complainants have written letters to political and administrative authorities, petitioned advisory or mediation bodies and petitioned representatives of the prosecution service (chief prosecutors and public prosecutors), but have not, strictly speaking, initiated legal action and seen it through to its conclusion by availing themselves of all available remedies of appeal and judicial review. Of all these authorities, only the representatives of the prosecution service are authorized by law to open a preliminary inquiry and refer a case to the investigating judge. In the Algerian legal system, it is the public prosecutor who receives complaints and who institutes criminal proceedings if they are warranted. Nevertheless, in order to protect the rights of victims or their beneficiaries, the Code of Criminal Procedure authorizes the latter to sue for damages by filing a complaint with the investigating judge. In this case, it is the victim, not the prosecutor, who initiates criminal proceedings by bringing the matter before the investigating judge. This remedy, which is provided for in articles 72 and 73 of the Code of Criminal Procedure, was not utilized, despite the fact that it would have enabled the victims to institute criminal proceedings and compel the investigating judge to initiate proceedings, even if the prosecution service had decided otherwise.

4.6 The State party also notes the author's contention that the adoption by referendum of the Charter for Peace and National Reconciliation and its implementing legislation — in particular, article 45 of Ordinance No. 06-01 — makes it impossible to consider that any effective domestic remedies exist in Algeria to which the families of victims of disappearance could have recourse . On this basis, the author believed she did not need to bring the matter before the relevant courts in view of what the author presumed would be the courts' position and findings regarding the application of the ordinance. However, authors cannot invoke this Ordinance and its implementing legislation as a pretext for failing to institute the legal proceedings available to them. The State party recalls the Committee's jurisprudence to the effect that a person's subjective belief in, or presumption of, the futility of a remedy does not exempt that person from the requirement that all domestic remedies be exhausted.[6]

4.7 The State party then turns its attention to the nature, principles and content of the Charter for Peace and National Reconciliation and its implementing legislation. It maintains that, in accordance with the principle of the inalienability of peace, which has become an international right to peace, the Committee should support and consolidate peace and encourage national reconciliation with a view to strengthening States affected by domestic crises. As part of this effort to achieve national reconciliation, the State party adopted the Charter, whose implementing Ordinance prescribes legal measures for the discontinuance of criminal proceedings and the commutation or remission of sentences for any person who is found guilty of acts of terrorism or who benefits from the provisions of the legislation on civil dissent, except for persons who have committed or been accomplices in mass killings, rapes or bombings in public places. This Ordinance also introduces a procedure for filing an official finding of presumed death, which entitles the beneficiaries of disappeared persons to receive compensation as victims of the "national tragedy". Social and economic measures have also been put in place, including the provision of employment placement assistance and compensation for all persons considered to be victims of the "national tragedy". Finally, the Ordinance prescribes political measures, such as a provision under which any person who exploited religion in the past in a way that contributed to the "national tragedy" is barred from engaging in political activity, and establishes the inadmissibility of any proceedings brought against individuals or groups who are members of any branch of the country's defence and security forces for actions undertaken to protect persons and property, safeguard the nation and preserve its institutions.

4.8 In addition to the establishment of the fund to compensate all victims of the "national tragedy", the sovereign people of Algeria have, according to the State party, agreed to a process of national reconciliation as the only way to heal the wounds inflicted by that tragedy. The State party insists that the proclamation of the Charter for Peace and National Reconciliation reflects a desire to avoid confrontation in the courts, media outpourings and political score-settling. The State party is therefore of the view that the author's allegations are covered by the comprehensive domestic settlement mechanism provided for in the Charter.

4.9 The State party asks the Committee to note how similar the facts and situations described by the author are and to take into account the sociopolitical and security context in which they occurred; to find that the author failed to exhaust all domestic remedies; to recognize that the authorities of the State party have established a comprehensive domestic mechanism for processing and settling cases such as that referred to in the communication through measures aimed at achieving peace and national reconciliation that are consistent with the principles of the Charter of the United Nations and subsequent covenants and conventions; to find the communication inadmissible; and to request that the author seek an alternative remedy.

Author's comments on the State party's submission

5.1 On 3 December 2012, the author submitted her comments on the State party's observations. First of all, the author wishes to draw the Committee's attention to the general nature of the State party's response, which is simply a copy of the arguments that it has presented systematically for all the individual communications pending before the Committee since the Charter and its implementing legislation came into effect. She claims that Algeria has failed to take into account the Committee's requirement that States must provide specific responses and pertinent evidence in reply to the contentions of the author of a communication.

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[6] The State party cites, in particular, communications No. 210/1986 and No. 225/1987, *Pratt and Morgan v. Jamaica*, Views adopted on 6 April 1989.

5.2 The author emphasizes that, according to the settled jurisprudence of the Human Rights Committee[7] only effective and available remedies within the meaning of article 2, paragraph 3, need to be exhausted. Concerning the State party's contention that domestic remedies have not been exhausted, the author recalls that the Lakhdar-Chaouch family, in accordance with Algerian legal procedure, submitted numerous appeals, all of which proved ineffective. Of the numerous judicial and non-judicial complaints lodged between 1998 and 2006, none resulted in a diligent investigation or criminal proceedings, although they concerned serious allegations of enforced disappearance. Although it is incumbent upon the State to show that it has actually fulfilled its obligation to carry out an investigation, the Algerian authorities have provided no specific response concerning the situation of Ali Lakhdar-Chaouch; they have merely given a general response instead. The State has adduced no tangible evidence that a genuine effort was made to search for the author's son and to identify those responsible for his disappearance.

5.3 The author refers to the State party's argument that the requirement to exhaust domestic remedies entails the author suing for damages in criminal proceedings by filing a complaint with the investigating judge. She recalls that she lodged numerous complaints with the El Harrach court and the Hussein-Dey court, all of which were dismissed. In addition, she refers to previous decisions of the Committee regarding cases of enforced disappearance in which it stated that to sue for damages for offences as serious as those alleged in the present case could not be considered a substitute for the charges that should be brought by the public prosecutor.[8] It was up to the prosecutor himself to conduct a thorough investigation.

5.4 With regard to the State party's argument that a person's mere subjective belief in, or presumption of, the futility of a remedy does not exempt that person from the requirement that all domestic remedies be exhausted, the author refers to article 45 of Ordinance No. 06-01, which precludes any possibility of legal action against agents of the State. According to the Committee's jurisprudence,[9] Ordinance No. 06-01, without the amendments recommended, appears to promote impunity and therefore cannot, as it currently stands, be considered compatible with the Covenant. The victims have thus exhausted all available domestic remedies.

5.5 The author also recalls that, according to the Committee's jurisprudence, the State party may not invoke the provisions of the Charter for Peace and National Reconciliation against persons who have submitted communications to the Committee.[10]

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[7] See, for example, communications No. 1780/2008, *Zarzi v. Algeria*, Views adopted on 22 March 2011, para. 6.3; and No. 1811/2008, *Djebbar and Chihoub v. Algeria*, Views adopted on 31 October 2011, para. 7.3.

[8] See, for example, communications No. 1753/2008, *Guezout et al. v. Algeria*, Views adopted on 19 July 2012, para. 7.4; and No. 1905/2009, *Khirani v. Algeria*, Views adopted on 26 March 2012, para. 6.4.

[9] See, for example, *Guezout et al. v. Algeria*, para. 8.2 and *Khirani v. Algeria*, para. 7.2.

[10] Ibid.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 First, the Committee recalls that the decision by the Special Rapporteur to examine the admissibility and the merits jointly (see para. 1.2) does not preclude their being considered separately by the Committee. The joint consideration of the admissibility and the merits does not mean that they must be examined simultaneously. Consequently, before considering any claim contained in a communication, the Human Rights Committee must decide, in accordance with rule 93 of its rules of procedure, whether the communication is admissible under the Optional Protocol to the Covenant.

6.2 Under article 5, paragraph 2 (a), of the Optional Protocol, the Committee must ascertain that the same matter is not being examined under another procedure of international investigation or settlement. It notes that the disappearance of Ali Lakhdar-Chaouch was reported to the United Nations Working Group on Enforced or Involuntary Disappearances (para. 2.5 above). However, it recalls that extra-conventional procedures or mechanisms which are established by the Commission on Human Rights or the Human Rights Council and whose mandates are to examine and report publicly on human rights situations in specific countries or territories, or cases of widespread human rights violations worldwide, do not generally constitute an international procedure of investigation or settlement within the meaning of article 5, paragraph 2 (a), of the Optional Protocol.[11] Accordingly, the Committee considers that the examination of Ali Lakhdar-Chaouch's case by the Working Group on Enforced or Involuntary Disappearances does not render the communication inadmissible under this provision.

6.3 The Committee notes that, in the State party's view, the author has not exhausted domestic remedies, since she did not consider the possibility of bringing the matter before the investigating judge and suing for damages in criminal proceedings under articles 72 and 73 of the Code of Criminal Procedure. The Committee also notes that, according to the State party, the author has written letters to political and administrative authorities but has not, strictly speaking, initiated legal action and seen it through to its conclusion by availing herself of all available remedies of appeal and judicial review. However, the Committee takes note of the author's argument that the Lakhdar-Chaouch family lodged numerous complaints with judicial bodies between 1998 and 2006 and that, after the promulgation on 27 February 2006 of Ordinance No. 06-01 on the implementation of the Charter for Peace and National Reconciliation, she no longer had the legal right to undertake judicial proceedings.

6.4 The Committee recalls that the State party has a duty not only to carry out thorough investigations into alleged violations of human rights brought to the attention of its authorities, particularly enforced disappearances or violations of the right to life, but also to prosecute, try and punish anyone held to be responsible for such violations.[12] Although Ali Lakhdar-Chaouch's family repeatedly contacted law enforcement and political authorities concerning his disappearance, the State party failed to conduct a thorough and effective investigation. The State party has also failed to provide sufficient evidence that an effective remedy is available, since Ordinance No. 06-01 of 27 February 2006 continues to be applied despite the Committee's recommendations that it should be brought into line with the Covenant.[13] The Committee recalls that, for the purposes of admissibility of a communication, the author must exhaust only the remedies effective against the alleged violation – in the present case, remedies effective against enforced disappearance. Moreover, the Committee recalls that to sue for damages for offences as serious as those alleged in the present case cannot be considered a substitute for the charges that should be brought by the public prosecutor.[14] Given the vague wording of articles 45 and 46 of the Ordinance, and in the absence of satisfactory information from the State party about their interpretation and actual enforcement, the author's fears about the effectiveness of filing a complaint are reasonable. In the light of all these considerations, the Committee concludes that article 5, paragraph 2 (b), of the Optional Protocol is not an obstacle to the admissibility of the present communication.

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[11] Communication No. 1874/2009, *Mihoubi v. Algeria*, Views adopted on 18 October 2013, para. 6.2.

[12] See, for example, communication No. 1791/2008, *Boudjemai v. Algeria*, Views adopted on 22 March 2013, para. 7.4.

6.5 The Committee considers that the author has sufficiently substantiated her claims insofar as they raise issues under articles 7, 9, 16 and article 2, paragraph 3, of the Covenant and therefore proceeds to consider the communication on the merits.

Consideration of the merits

7.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as required under article 5, paragraph 1, of the Optional Protocol.

7.2 In the present case, the State party has been content to argue that communications incriminating public officials, or persons acting on behalf of public authorities, in cases of enforced disappearances from 1993 to 1998 should be considered within the broader context of the sociopolitical situation and security conditions that prevailed in the country during a period when the Government was struggling to combat terrorism. The Committee observes that the Covenant requires the State party to concern itself with the fate of each individual and to treat each individual with respect for the inherent dignity of the human person. It further recalls its jurisprudence,[15] according to which the State party may not invoke the provisions of the Charter for Peace and National Reconciliation against persons who invoke provisions of the Covenant or who have submitted or may submit communications to the Committee. Ordinance No. 06-01, without the amendments recommended by the Committee, appears to promote impunity and therefore cannot, as it currently stands, be considered compatible with the provisions of the Covenant.[16]

7.3 The Committee notes that the State party has not replied to the author's claims concerning the merits of the case and recalls that, according to its jurisprudence,[17] the burden of proof should not rest solely on the author of a communication, especially given that the author and the State party do not always have the same degree of access to evidence and that often only the State party is in possession of the necessary information. It follows from article 4, paragraph 2, of the Optional Protocol that the State party has a duty to investigate in good faith all allegations of violations of the Covenant made against it and its representatives and to provide the Committee with the information available to it.[18] In the absence of any explanations from the State party in this respect, due weight must be given to the author's allegations, provided they have been sufficiently substantiated.

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[13] Concluding observations of the Human Rights Committee, Algeria, CCPR/C/DZA/CO/3, 12 December 2007, paras. 7, 8 and 13.

[14] See, for example, *Boudjemai v. Algeria*, para. 7.4.

[15] *Boucherf v. Algeria*, para. 11; communications No. 1588/2007, *Benaziza v. Algeria*, Views adopted on 26 July 2010, para. 9.2; No. 1781/2008, *Berzig v. Algeria*, Views adopted on 31 October 2011, para. 8.2; and *Khirani v. Algeria*, para. 7.2.

[16] See the concluding observations of the Human Rights Committee, Algeria, CCPR/C/DZA/CO/3, 1 November 2007, para. 7 (a).

[17] See, for example, communications No. 161/1983, *Herrera Rubio v. Colombia*, Views adopted on 2 November 1987, para. 10.5, and No. 1412/2005, *Butovenko v. Ukraine*, Views adopted on 19 July 2011, para. 7.3.

7.4 The Committee recognizes the degree of suffering involved in being held indefinitely without contact with the outside world. It recalls in this regard its general comment No. 20 (1992) on the prohibition of torture, or other cruel, inhuman or degrading treatment or punishment,[19] in which the Committee recommends that States parties should make provision against incommunicado detention. The Committee notes that, in the present case, Ali Lakhdar-Chaouch was arrested by Algerian military security officers on 1 April 1997 and that he has had no contact with his family since then. In the absence of a satisfactory explanation from the State party, the Committee considers that these events constitute a violation of article 7 of the Covenant in respect of Ali Lakhdar-Chaouch.[20]

7.5 The Committee also takes note of the anguish and distress caused to the author, the mother of Ali Lakhdar-Chaouch, by his disappearance. The Committee therefore considers that the information before it discloses a violation of article 7 of the Covenant with regard to the author.[21]

7.6 With regard to the alleged violations of article 9, the Committee notes the author's claim that the victim's arrest on 1 April 1997 by the Ben Aknoun military security forces has never been acknowledged, that his detention is not mentioned in the police custody registers and that there has been no real and effective investigation by the State. In the absence of satisfactory explanations from the State party, the Committee finds a violation of article 9 in respect of Ali Lakhdar-Chaouch.[22]

7.7 With regard to the alleged violation of article 16, the Committee reiterates its settled jurisprudence, according to which the intentional removal of a person from the protection of the law for a prolonged period of time may constitute a refusal to recognize that person as a person before the law if the victim was in the hands of the State authorities when last seen and if the efforts of his or her relatives to obtain access to potentially effective remedies, including judicial remedies (Covenant, art. 2, para. 3) have been systematically impeded.[23] In the present case, the Committee notes that the authorities of the State party have not provided the author with any information on the fate or whereabouts of Ali Lakhdar-Chaouch despite the author's requests to various State party authorities. The Committee concludes that Ali Lakhdar-Chaouch's enforced disappearance since 1 April 1997 has denied him the protection of the law and deprived him of his right to recognition as a person before the law, in violation of article 16 of the Covenant.

7.8 The author invokes article 2, paragraph 3, of the Covenant, which imposes on States parties an obligation to ensure an effective remedy for all persons whose rights under the Covenant have been violated. The Committee attaches importance to the establishment by States parties of appropriate judicial and administrative mechanisms for addressing claims of rights violations. It recalls its general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant,[24] which states that a failure by a State party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant. All the steps taken have proved futile, and the State party has failed to conduct a thorough and effective investigation into the disappearance. Furthermore, the absence of the legal right to undertake judicial proceedings since the promulgation of Ordinance No. 06-01 on the implementation of the Charter for Peace and National Reconciliation continues to deprive Ali Lakhdar-Chaouch and the author of any access to an effective remedy, since the Ordinance prohibits, on pain of imprisonment, the initiation of legal proceedings with a view to shedding light on the most serious crimes, such as enforced disappearances.[25] In view of the above, the Committee concludes that the information before it discloses a violation of article 2, paragraph 3, read in conjunction with articles 7, 9, and 16 of the Covenant in respect of Ali Lakhdar-Chaouch and a violation of article 2, paragraph 3, read in conjunction with article 7 of the Covenant in respect of the author.

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[18] See, for example, *Boudjemai v. Algeria*, para. 8.3.

[19] *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40*, (A/47/40), annex VI, sect. A.

[20] *Boudjemai v. Algeria*, para. 8.5.

[21] *Boudjemai v. Algeria*, para. 8.6.

[22] *Boudjemai v. Algeria*, para. 8.7.

[23] *Boudjemai v. Algeria*, para. 8.9.

[24] *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 40*, Vol. I (A/59/40 (Vol. I)), annex III.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the information before it discloses violations by the State party of articles 7, 9, 16 and article 2, paragraph 3, of the Covenant, read in conjunction with articles 7, 9 and 16, in respect of Ali Lakhdar-Chaouch. It also finds a violation of article 7 and of article 2, paragraph 3, of the Covenant, read in conjunction with article 7, in respect of the author.

9. In accordance with article 2, paragraph 3, of the Covenant, the State party is under an obligation to provide the author with an effective remedy including by: (a) conducting a thorough and effective investigation into the disappearance of Ali Lakhdar-Chaouch; (b) providing the author with detailed information about the results of its investigation; (c) releasing the victim immediately if he is still being held incommunicado; (d) if Ali Lakhdar-Chaouch is deceased, handing over his remains to his family; (e) prosecuting, trying and punishing those responsible for the violations committed; and (f) providing adequate compensation to the author for the violations suffered and to Ali Lakhdar-Chaouch if he is still alive. Ordinance No. 06-01 notwithstanding, the State party should also ensure that it does not impede enjoyment of the right to an effective remedy for the victims of crimes such as torture, extrajudicial killings and enforced disappearances. The State party is also under an obligation to take steps to prevent similar violations in the future.

10. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether or not there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when a violation has been established, the Committee wishes to receive information from the State party, within 180 days, about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views and to have them widely disseminated in the official languages of the State party.

[Adopted in English, French and Spanish, the French text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

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[25] CCPR/C/DZA/CO/3, para. 7.

Appendix

Separate opinion of Mr. Fabián Omar Salvioli and Mr. Victor Manuel Rodríguez-Rescia (concurring)

1. We share the opinion of the Committee and the conclusions that it has reached in *Lakhdar-Chaouch v. Algeria* (communication No. 1899/2009). Consistent with what we have stated on several occasions in similar cases,[a] we also consider that, in the present instance, the Committee should have indicated that, by adopting Ordinance No. 06-01, certain provisions of which — in particular article 46 — are clearly incompatible with the Covenant, the State has failed to comply with the general obligation set forth in article 2, paragraph 2, of the Covenant. The Committee should also have found a violation of article 2, paragraph 2, read in conjunction with other substantive provisions of the Covenant. With regard to redress, we consider that the Committee should have recommended that the State bring Ordinance No. 06-01 into line with the Covenant.

2. Moreover, in the present case, the Committee should have found a violation of article 6 of the Covenant, given that the State has failed in its duty to guarantee the right to life. Had the Committee reached that conclusion, its position would have been consistent with its jurisprudence in previous cases — some involving the same State party — which involve facts and events that are identical in nature to those of the Lakhdar-Chaouch case.[b] Furthermore, during the same session at which the present conclusions were adopted, in a similar case of enforced disappearance, the Committee reached a different conclusion even though the proven facts were the same.[c]

3. We have repeatedly maintained that, when faced with proven facts in a case file, the Committee's application of the Covenant should not be limited by the parties' legal arguments. Thus, the Committee has acted correctly on various occasions,[d] although on others, such as the present Lakhdar-Chaouch case, the Committee has decided to restrict the scope of its deliberations without providing valid reasons for doing so.

4. For reasons set out previously in respect of similar cases, to which we refer the reader in order to avoid repeating them here, we consider that, in the present case, the Committee should also have found that, by adopting Ordinance No. 06-01, the State has violated various substantive Covenant rights under article 2, paragraph 2.[e] Consequently, in the paragraph on redress, the Committee should have recommended that the State party bring Ordinance No. 06-01 into line with the provisions of the Covenant.

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[a] See, for example, our joint separate opinion in *Mihoubi v. Algeria*, communication No. 1874/2009.

[b] See, for example, communications No. 1781/2008, *Berzig v. Algeria*, Views adopted on 31 October 2011 and No. 1798/2008, *Azouz v. Algeria*, Views adopted on 25 July 2013.

[c] See communication No. 1889/2009, *Marouf v. Algeria*, Views adopted on 21 March 2004, paras. 7.4 and 8.

[d] Simply by way of example, see Human Rights Committee communications No. 1390/2005, *Koreba v. Belarus*, Views adopted on 25 October 2010; 1225/2003, *Eshonov v. Uzbekistan*, Views adopted on 22 July 2010, para. 8.3; No. 1206/2003, *R.M. and S.I. v. Uzbekistan*, Views adopted on 10 March 2010, paras. 6.3 and 9.2, with a finding of no violation; No. 1520/2006, *Mwamba v. Zambia*, Views adopted on 10 March 2010; No. 1320/2004, *Pimentel et al. v. Philippines*, Views adopted on 19 March 2007, paras. 3 and 8.3; No. 1177/2003, *Ilombe and Shandwe v. Democratic Republic of the Congo*, Views adopted on 17 March 2006, paras. 5.5, 6.5 and 9.1; 973/2001, *Khalilova v. Tajikistan*, Views adopted on 30 March 2005, para. 3.7; and No. 1044/2002, *Shukurova v. Tajikistan*, Views adopted on 17 March 2006, para. 3.

[e] See our separate opinion in *Mihoubi v. Algeria*, communication No. 1874/2009.

5. We consider that the Committee must ensure consistency in decisions concerning equally proven facts, in the effective implementation of the Covenant and in redress to prevent a recurrence of the events. It is by acting with the appropriate legal clarity that the Human Rights Committee will better fulfil its task of making sure that States parties respect and uphold the rights contained in the Covenant.

[Done in English, French and Spanish, the Spanish text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

X. Communication No. 1900/2009, *Mehalli v. Algeria* (Views adopted on 21 March 2014, 110th session)*

Submitted by:	Fatima Mehalli (represented by counsel, the Collectif des familles de disparu(e)s en Algérie)
Alleged victims:	Mohamed Mehalli (disappeared), his wife, Fatma Mehalli, and their children: Bedrane Mehalli; Abderrahmane Mehalli; Soumia Mehalli; Razika Mehalli; and Atik Mehalli (deceased); and the author herself
State party:	Algeria
Date of communication:	26 June 2009 (initial submission)
Subject matter:	Enforced disappearance
Procedural issue:	Exhaustion of domestic remedies
Substantive issues:	Right to life, prohibition of torture and cruel or inhuman treatment, right to liberty and security of persons, respect for the inherent dignity of the human person, recognition as a person before the law, and right to an effective remedy
Articles of the Covenant:	Articles 2 (para. 3), 6, 7, 9, 10 (para. 1) and 16
Article of the Optional Protocol:	Article 5 (para. 2 (b))

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 21 March 2014,

Having concluded its consideration of communication No. 1900/2009 submitted to the Human Rights Committee by Fatima Mehalli under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The author of the communication is Fatima Mehalli, born in 1969 and of Algerian nationality, who is acting on behalf of her father, Mohamed Mehalli (disappeared), born in

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* The following members of the Committee participated in the examination of the present communication: Mr. Yadh Ben Achour, Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Walter Kälin, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Gerald L. Neuman, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabián Omar Salvioli, Mr. Marat Sarsembayev, Mr. Krister Thelin and Ms. Margo Waterval.

1935, her mother, Fatma Mehalli, born in 1939, the wife of the disappeared person, and their children (the author's brothers and sisters): Bedrane Mehalli, born in 1971; Abderrahmane Mehalli, born in 1977; Soumia Mehalli, born in 1964, Razika Mehalli, born in 1974; and Atik Mehalli (deceased), born in 1978; all of Algerian nationality, and on her own behalf. She argues that her father and the members of her family are victims of various violations by the State party under articles 2 (para. 3), 6, 7, 9, 10 and 16 of the International Covenant on Civil and Political Rights. She is represented by the Collectif des familles de disparu(e)s en Algérie.[1]

1.2 On 19 October 2009, the Committee, through its Special Rapporteur on New Communications and Interim Measures, decided not to consider the admissibility and the merits of the case separately.

The facts as submitted by the author

2.1 The families of brothers Cherif and Mohamed Mehalli lived in the same house, which they had inherited from their parents. Cherif was registrar at the Tribunal of Hussein Dey. In 1992, members of the Islamic Salvation Front threatened him with death if he did not leave his job; he went on sick leave. One night, several uniformed police officers raided the family home, arrested him and detained him for 8 days in Hussein Dey police station, where he was violently tortured. Two months later, after the police had once again come looking for him at his home, Cherif told his relatives that he was leaving. From that time onwards, the house and indeed the whole neighbourhood was put under surveillance and the family was regularly threatened by the police.

2.2 As Cherif did not return, the police went after his nephew, Bedrane (brother of the author), whom they arrested and detained for 2 days at Leveilley police station for the first time in 1993. Arrested again three months later, he was violently tortured at Hussein Dey police station: he was kept sitting on a chair, handcuffed, with his hands behind his back, for four days in a row, while the police officers beat him regularly. He did not eat or drink for more than eight days. When his father went to the police station to visit him, the officers confirmed that they were holding Bedrane and said that he would be released only if his uncle Cherif gave himself up; he was eventually released, but was harassed, beaten and arrested again on numerous occasions. After that, the police wanted him to act as an informer, but Bedrane fled to stay with relatives outside of Algiers for a while before returning to the family home, as the people he was staying with feared reprisals. Meanwhile, the family was subjected to constant harassment by the police, who carried out regular searches and vandalized the family home, under the pretext of looking for Cherif. Tired of this harassment and after receiving threatening letters from the (clandestine) Organisation des jeunes Algériens libres (Organization of Young Free Algerians) (stating that Cherif was a terrorist and that they were going to attack his property and his relatives), Bedrane left the family home and never returned. His relatives think that he joined the maquis.

2.3 The police then picked on Atik, another of the author's brothers, born in 1978. One day, on his way to school, he was going past a police control post when he was recognized by the police, who hit him. On 15 July 1996, during a police raid in the locality led by an officer named Saad, Atik tried to follow the young people running away from the police. Because of a disability resulting from a fall, he held his right hip as he was running. The police thought that he was hiding a weapon, and shot him repeatedly; he died on the spot. The family went to the police station to find out what had happened, and met with police officer Saad, who told them he had sworn to clean up the neighbourhood and destroy any family who had a relative who was a terrorist. The family had great difficulty in recovering Atik's remains, finally managing 12 days after he was killed, having waited each day in front of a cemetery in Algiers.

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[1] The Optional Protocol entered into force for the State party on 12 December 1989.

2.4 The author's father, Mohamed Mehalli, (brother of Cherif, and father of Bedrane and Atik) was arrested for the first time in 1995, after being summoned to Leveilley police station and imprisoned in El Harrach prison. Tried on 1 January 1997, he was sentenced to 1 year in prison for belonging to a terrorist group and for not reporting a killer. As he had already spent 14 months in pretrial detention, he was released on 2 January 1997.

2.5 A week after his release, police officer Saad again came to his home to arrest him. At the house, he found the author, who told him that her father was absent, whereupon the officer struck and insulted her. He waited until the author's father came home and took him away before then releasing him. This was repeated approximately every two weeks, and every time he was arrested, the author's father was beaten. Early in the morning of 14 September 1997, police officers came back to the house and told Mohamed to come out; once outside, he was forced to the ground and beaten for about 10 minutes. On 18 September 1997, police officers led by Saad came back and took Mohamed to a nearby building site. He was pushed to the ground and beaten; his beard was burned and a heavy stone was put on his chest. He had to be treated by a doctor.

2.6 To flee the harassment, he rented a house in another neighbourhood and the family lived there for nearly a year, until 29 June 1998, when Mohamed was arrested in his car by military security officers, in the presence of witnesses. Meanwhile, soldiers and plainclothes police officers raided the family home. The next day, the author and her mother, worried because Mohamed had not come home, went to the police station, but to no avail. When they returned home, military security officers were waiting for them, and the author, her sister Soumia and their mother Fatma were blindfolded and taken in a van to Chateauneuf barracks, infamous for torture and incommunicado detention.

2.7 Once in the barracks, the three women were held separately in different cells. The author was interrogated and then beaten, in order, she believes, for her father, who was also being held there, to hear. She herself could hear her father being tortured. Her sister Soumia was made to lie on a cement table and then tied down with cables connected to a battery which gave her electric shocks. She then suffered torture with a cloth, which prevented her from breathing, before being raped with a stick. The three women were held for 8 days and then taken back to their home. Just before they were released, the author saw her father from the window of her cell. He was being dragged by guards because he had difficulty walking. The family has not had any news of him since that day.

2.8 The police then moved onto Abderrahmane, the author's other brother. He was first arrested in 1993 during a police raid after an attack in the neighbourhood. He was held in Leveilley police station for 3 days and then released after questioning. He was arrested again in 1996 and detained at the same police station for 15 days. The police questioned him about his brother Bedrane and his uncle Cherif. He was arrested again a few months later, and held for 27 days. In March 1997, he was arrested and held for 15 days in detention at Leveilley police station before being taken to El Harrach prison. On 29 March 1997, Algiers criminal court sentenced him to 5 years in prison for membership of a terrorist group. Released in 2002, Abderrahmane was arrested three more times by the police, who asked him to cooperate with them in exchange for a car and money; he refused and the police threatened him. Unable to bear the harassment any longer, he applied for a visa to go abroad. However, on 26 December 2006, he was arrested again, and his family had no news of him for 12 days. During that period of detention, Abderrahmane was forced under torture to confess that he had had contact with armed terrorist groups. Members of his family who visited him on 14 June 1998 found him physically and psychologically marked by the torture: he had a wound to his head and was staring blankly. He told one of his sisters that, with a group of prisoners, he had been tortured and sexually abused by security agents who were visiting the prison. On 23 December 2008, he was sentenced to 4 years in prison and, at the time that the communication was submitted, he was being held in prison in Berrouaghuia.

Exhaustion of domestic remedies

2.9 Invoking several of the Committee's Views confirming its established jurisprudence, the author observes that only effective and available remedies need to be exhausted. She states that the family of the disappeared person pursued all possible remedies, administrative and judicial, to no avail.

2.10 Regarding the summary execution of her brother Atik on 15 July 1996, the author claims that no recourse is available, since the officer responsible for his death has admitted carrying out the killing, but has threatened the family with reprisals if they take any legal action. The fear of other relatives being tortured or killed has deterred the family from filing a complaint.

2.11 Similarly, Bedrane, who has been a victim of harassment, arbitrary detention and repeated torture, has not filed a complaint (nor has his family in this regard) against the authorities, since this would have irremediably exposed the family to reprisals and any complaints would then have had no chance of success.

2.12 In 1998, after they too had suffered torture and arbitrary detention, the author and her mother, represented by a lawyer, filed numerous appeals concerning the disappearance of Mohamed Mehalli. On 8 May 2000, the investigating judge of the Tribunal of Hussein Dey ordered that there were no grounds for prosecution; a second order of no grounds for prosecution was pronounced on 8 August 2000 by an investigating judge of another chamber of the same Tribunal. On 22 July 2000, the same court refused the author's request for a certificate attesting to the disappearance of her father, on the grounds that she did not have locus standi. On 7 February 2004, the author's mother filed a complaint with the court of the same Tribunal and, on 18 October 2004, the Tribunal finally recognized Mohamed Mehalli's disappearance; the Bachdjarah gendarmerie issued the certificate on 4 July 2006.

2.13 In respect of opening an investigation or a possible prosecution, the author argues that, in any event, no effective remedy is available within the meaning of article 2 of the Covenant in the present case, particularly in the light of the texts governing the application of the Charter for Peace and National Reconciliation, which prevent any legal recourse against officers of the State, thereby depriving victims of any effective remedy.

2.14 With regard to administrative remedies, the family filed a complaint with the wilaya of Algiers on 21 September 1998 (no action taken). They also contacted the National Human Rights Observatory on 14 July 1999. The National Advisory Commission for the Promotion and Protection of Human Rights, the successor to the Observatory, replied on 24 July 2002 that, according to the information obtained by the security forces, attempts to find the author's father had proved fruitless. Following a second letter sent to the Observatory on 7 September 1999, the family received a reply on 15 May 2000, saying that the author's father had never been sought or arrested by the security forces.

The complaint

3.1 The author alleges that the State party is guilty of a violation of articles 2 (para. 3), 7, 9 and 16 of the Covenant in respect of her father, Mohamed Mehalli, who has disappeared. She asks that the members of Mohamed Mehalli's family should be compensated under article 2, paragraph 3, of the Covenant and that the authorities carry out an effective investigation.

3.2 The author also claims a violation of articles 6 and 2 (para. 3) of the Covenant in respect of her brother, Atik, who was killed; of articles 2 (para. 3) and 7 in respect of her mother, Fatma, the author herself and her sister, Soumia; of articles 7 and 9 in respect of her brother, Bedrane; and of articles 7, 10 and 2 (para. 3) in respect of her other brother, Abderrahmane.

State party's observations

4.1 On 6 October 2009, the State party contested the admissibility of the communication.[2] It submits that the communication incriminates public officials, or persons acting on behalf of public authorities, in relation to enforced disappearances that occurred during the period in question — from 1993 to 1998 — and should be considered in the broader context of the sociopolitical situation and declared inadmissible. The individual focus in this complaint does not reflect the national sociopolitical and security context in which the alleged events are said to have occurred, and does not reflect reality or the factual diversity of the situations covered by the generic term "enforced disappearance" during the period in question.

4.2 Contrary to the theories propounded by international NGOs, which the State party finds to be not very objective, the painful ordeal of terrorism that the State party experienced cannot be seen as a civil war between two opposing camps, but rather as a crisis that led to the spread of terrorism following calls for civil disobedience. This in turn led to the emergence of a multitude of armed groups engaged in terrorist crimes, acts of subversion, the destruction and sabotage of public infrastructure, and acts of terror targeting the civilian population. As a result, in the 1990s, the State party went through one of the most terrible ordeals of its young life as an independent country. In this context, and in accordance with the Constitution, precautionary measures were implemented, and the Algerian Government informed the Secretariat of the United Nations of its declaration of a state of emergency, in accordance with article 4, paragraph 3, of the Covenant.

4.3 During this period, terrorist attacks were a daily occurrence in the country; they were carried out by a host of ideologically driven armed groups with little in the way of hierarchy, which severely diminished the ability of the authorities to control the security situation. As a result, there was some confusion in the manner in which a number of operations were carried out among the civilian population, and it was difficult for civilians to distinguish between the actions of terrorist groups and those of the security forces, to whom civilians often attributed enforced disappearances. According to a variety of independent sources, including the press and human rights organizations, the concept of disappearances in Algeria during the period in question covers six possible scenarios, none of which can be blamed on the State: (a) persons reported missing by their relatives but who in fact had chosen to go into hiding in order to join an armed group and who instructed their families to report that they had been arrested by the security services as a way of "covering their tracks" and avoiding "harassment" by the police; (b) persons who were reported missing after their arrest by the security services but who took advantage of their subsequent release to go into hiding; (c) persons abducted by armed groups which, because they were not identified or had taken uniforms or identification documents from police officers or soldiers, were mistakenly identified as members of the armed forces or security services; (d) persons reported missing by their families but who had actually deliberately abandoned them and in some cases even left the country because of personal problems or family disputes; (e) persons reported missing by their families who were actually wanted terrorists who had been killed and buried in the maquis after factional infighting, doctrinal disputes or arguments over the spoils of war among rival armed groups; and finally (f) persons reported missing who were in fact living in Algeria or abroad under false identities created via a vast network of document forgers.

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[2] In the same submission, the State party in fact contested the admissibility of eight other communications received.

4.4 The State party maintains that it was in view of the diversity and complexity of the situations covered by the concept of disappearance that the Algerian legislature, following the referendum on the Charter for Peace and National Reconciliation, recommended a comprehensive approach to the issue of disappearances, taking account of all persons who had disappeared in the context of the "national tragedy", and under which all victims would be offered support to overcome their ordeal and all victims of disappearance and their beneficiaries would be entitled to redress. According to statistics from the Ministry of the Interior, 8,023 disappearances have been reported, 6,774 cases examined, 5,704 approved for compensation and 934 rejected, with 136 still pending. In total, 371,459,390 Algerian dinars have been paid out as compensation to all the victims concerned and 1,320,824,683 dinars are paid in the form of monthly pensions.

4.5 The State party further argues that not all domestic remedies have been exhausted. It stresses the importance of distinguishing between simple formalities involving the political or administrative authorities, non-judicial remedies pursued through advisory or mediation bodies, and judicial remedies pursued through the relevant courts of justice. The State party notes that it may be seen from the author's statements that the complainants have written letters to political and administrative authorities, petitioned advisory or mediation bodies and representatives of the prosecution service (chief prosecutors and public prosecutors), but have not, strictly speaking, initiated legal proceedings and seen them through to their conclusion using all available remedies of appeal and judicial review. Of all these authorities, only the representatives of the prosecution service are authorized by law to open a preliminary inquiry and refer a case to an investigating judge. In the Algerian system, it is the public prosecutor who receives complaints and who institutes criminal proceedings if these are warranted. Nevertheless, in order to protect the rights of victims and their beneficiaries, the Code of Criminal Procedure authorizes them to institute criminal proceedings by filing a complaint with the investigating judge. In that case, it is the victim, not the prosecutor, who institutes criminal proceedings by bringing the matter before the investigating judge. This remedy, which is provided for in articles 72 and 73 of the Code of Criminal Procedure, was not used, despite the fact that it would have enabled the victims to institute criminal proceedings and compel the investigating judge to initiate an investigation, even if the prosecution service had decided otherwise.

4.6 The State party also notes the author's contention that the adoption by referendum of the Charter for Peace and National Reconciliation and its implementing legislation — in particular, article 45 of Ordinance No. 06-01 — makes it impossible to consider that any effective and available domestic remedies exist in Algeria to which the families of victims of disappearance could have recourse. On this basis, the author believed she was under no obligation to bring the matter before the relevant courts, in view of their likely position and findings regarding the application of the Ordinance. However, the author cannot invoke this Ordinance and its implementing legislation to absolve herself of responsibility for failing to institute the legal proceedings available to her. The State party recalls the Committee's jurisprudence to the effect that a person's subjective belief in, or presumption of, the futility of a remedy does not exempt that person from the requirement to exhaust all domestic remedies.[3]

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[3] The State party cites, inter alia, communications Nos. 210/1986 and 225/1987, *Pratt and Morgan v. Jamaica*, Views adopted on 6 April 1989.

4.7 The State party then turns its attention to the nature, principles and content of the Charter for Peace and National Reconciliation and its implementing legislation. It maintains that, in accordance with the principle of the inalienability of peace, which has become an international right to peace, the Committee should support and consolidate peace and encourage national reconciliation with a view to strengthening States affected by domestic crises. As part of this effort to achieve national reconciliation, the State party adopted the Charter, and its implementing ordinance prescribes legal measures for the discontinuance of criminal proceedings and the commutation or remission of sentences for any person who is found guilty of acts of terrorism or who benefits from the provisions of the legislation on civil dissent, except for persons who have committed or been accomplices to mass killings, rapes or bombings in public places. This Ordinance also helps to address the issue of disappearances by introducing a procedure for filing an official finding of presumed death, which entitles beneficiaries to receive compensation as victims of the "national tragedy". Social and economic measures have also been put in place, including the provision of employment placement assistance and compensation for all persons considered victims of the "national tragedy". Finally, the Ordinance prescribes political measures, such as a ban on engaging in political activity for any person who exploited religion in the past in a way that contributed to the "national tragedy", and establishes the inadmissibility of any proceedings, individual or joint, brought against members of any branch of Algeria's defence and security forces for actions undertaken to protect persons and property, safeguard the nation and preserve its institutions.

4.8 In addition to the establishment of funds to compensate all victims of the "national tragedy", the sovereign people of Algeria have, according to the State party, agreed to a process of national reconciliation as the only way to heal the wounds inflicted. The State party insists that the proclamation of the Charter for Peace and National Reconciliation reflects a desire to avoid confrontation in the courts, media outpourings and political score-settling. The State party is therefore of the view that the author's allegations are covered by the comprehensive domestic settlement mechanism provided for in the Charter.

4.9 The State party asks the Committee to take into account the sociopolitical and security context at the time; to find that the author failed to exhaust all domestic remedies; to recognize that the authorities of the State party have established a comprehensive national mechanism for processing and settling the cases referred to in these communications through a policy of peace and national reconciliation that is consistent with the principles of the Charter of the United Nations and subsequent covenants and conventions; to find the communication inadmissible; and to request that the author seek an alternative remedy.

4.10 In a further memorandum, the State party raises the question of whether the submission of a series of individual communications to the Committee might not actually be an abuse of procedure in respect of a broad historical issue whose causes and circumstances elude the Committee. These "individual" communications dwell on the general context in which the disappearances occurred, focusing solely on the actions of the security forces and never mentioning those of the various armed groups that used criminal concealment techniques to incriminate the armed forces.

4.11 The State party insists that it will not address the merits of these communications until the issue of their admissibility has been settled, and notes that all judicial or quasi-judicial bodies have a duty to deal with preliminary questions before considering the merits. The decision in the cases in point to consider questions of admissibility and the merits jointly and simultaneously — aside from the fact that it was not arrived at on the basis of consultation — seriously prejudices the proper consideration of the communications in terms of both their general nature and their intrinsic particularities. Referring to the rules of procedure of the Human Rights Committee, the State party notes that the sections relating to the Committee's procedure to determine the admissibility of communications are separate from those relating to the consideration of communications on the merits, and that therefore these questions could be considered separately. It maintains that none of the complaints or requests for information made by the authors of the communications were submitted through channels that would have allowed consideration of the case by the Algerian judicial authorities and notes that only a few of the communications reached the level of the Indictments Chamber (court with jurisdiction to hear appeals).

4.12 Recalling the Committee's jurisprudence regarding the obligation to exhaust domestic remedies, the State party maintains that mere doubts about the prospect of success or worries about delays do not exempt an author from the obligation to exhaust these remedies. As to the question of whether the promulgation of the Charter for Peace and National Reconciliation has ruled out the possibility of any remedy in this area, the State party replies that the failure of the author to take any steps to submit her allegations to scrutiny has prevented the Algerian authorities from taking a position on the scope and limitations of the applicability of the Charter. Moreover, under the Ordinance in question, the only proceedings that are inadmissible are those brought against "members of the defence and security forces of the Republic" for actions consistent with their core duties to the Republic, namely, to protect persons and property, safeguard the nation and preserve its institutions. On the other hand, any allegations concerning actions attributable to the defence or security forces that can be proved to have taken place in any other context are subject to investigation by the appropriate courts.

4.13 On 24 January 2011, the State party reiterated its previous comments in extenso.

Author's comments on the State party's submission

5.1 On 30 August 2012, the author submitted comments on the State party's observations. She points out that the State party contests the admissibility of the communication for non-exhaustion of domestic remedies, given, inter alia, that no legal proceedings had been instituted and followed through, in appeal or judicial review. Referring to the Committee's jurisprudence, the author notes that only available and effective remedies must be exhausted, and that the local remedies rule does not apply to appeals that objectively have no prospect of success. She notes that the Committee has found that the useful nature of a remedy assumes that the State party has an obligation to conduct a thorough investigation into the alleged crimes on the merits, but that this requirement has not been met in this case. She then recalls all the administrative and judicial procedures undertaken by the family to find out what had happened to the victim, including two complaints to the Prosecutor of the Tribunal of Hussein Dey filed by a lawyer in the year following the disappearance, which led to an order stating that there were no grounds for prosecution. In respect of the summary execution of her brother Atik and the arbitrary detention and torture of her brothers Bedrane and Abderrahmane, she notes that, according to the Committee's jurisprudence, a victim is not required to use remedies that are likely to cause him or her harm. She reiterates that the harassment and threats suffered by the family have deterred them from initiating judicial proceedings.

5.2 The author adds that, in the present case, there was no need to compensate for any lack of action by a prosecutor by making use of articles 72 and 73 of the Code of Criminal Procedure, given that, despite their fears, the family did petition the prosecutor who, in turn, initiated the procedure leading to the judicial orders of 8 May and 8 August 2000. In 2000 as well, the family took steps to obtain a declaration of disappearance of the author's father, which was produced only in October 2004, with no mention of the circumstances of the disappearance. Subsequently, in application of the Charter for Peace and National Reconciliation, a certificate of disappearance of the author's father was drawn up on 4 July 2006, but the document does not specify the circumstances of the disappearance, despite the family's testimony to the police investigation department; the family was never involved in any investigation.

5.3 The author invokes the Committee's Views in communication No. 1588/2007, *Benaziza v. Algeria*,[4] and notes that, in the present case, the competent authorities should not have ignored the enforced disappearance of Mohamed Mehalli and should have conducted a thorough investigation into the alleged facts, searched for the perpetrators and initiated proceedings. In the light of the description of the family and the information given about the alleged perpetrators, the public prosecutor could, under article 170 of the Code of Criminal Procedure, have appealed against the investigating judge's decision that there were no grounds for prosecution. According to the author, this all shows that the family did not have access to effective or useful remedies to oblige the authorities to proceed with a thorough and rigorous investigation. The subsequent entry into force of Ordinance No. 06-01 of 27 February 2006 meant that remedies were no longer available to families of the disappeared, since its article 45 makes it impossible to bring any proceedings against the defence or security forces.

5.4 The author claims that the three situations described in article 45 of Ordinance No. 06-01 are formulated so broadly as to encompass all circumstances in which State officials have engaged in serious acts of violence against persons, such as disappearances, extrajudicial killings and even torture. Thus, in stating that complaints against members of the military or security forces will automatically be deemed inadmissible, article 45 precludes any possibility of a complaint being declared admissible by the prosecution service.

5.5 Many of the families of disappeared persons who have lodged complaints through the courts against a person or persons unknown or who have requested an investigation into the fate of a disappeared person have been directed to the wilaya commission charged with implementing the Charter for Peace and National Reconciliation in order to carry out the necessary steps to obtain compensation. The author maintains that, since 2006, the application of the Charter for Peace and National Reconciliation and the compensation procedure has been the only response of the authorities to all the demands for the truth addressed by the families to the relevant judicial and administrative bodies. She also points out that the Committee has declared article 45 of the Ordinance not to be in conformity with the Covenant, called for it to be amended and requested the State party to take all appropriate measures to guarantee that serious violations of human rights, such as torture and disappearances, are investigated and that the perpetrators of such violations, including State officials and members of armed groups, are prosecuted.[5]

Issues and proceedings before the Committee

Consideration of admissibility

6.1 The Committee first recalls that the decision to examine the admissibility and the merits jointly (see paragraph 1.2 of the present Views) does not preclude their being considered separately by the Committee. The joinder of cases does not mean they must be examined simultaneously. Therefore, before considering any claim contained in a communication, the Human Rights Committee must decide, in accordance with rule 93 of its rules of procedure, whether the communication is admissible under the Optional Protocol to the Covenant.

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[4] Communication No. 1588/2007, *Benaziza v. Algeria*, Views adopted on 26 July 2010.

[5] Concluding observations of the Human Rights Committee concerning the third periodic report of Algeria, CCPR/C/DZA/CO/3, adopted on 1 November 2007, paras. 7 (a) and (b).

6.2 As required under article 5, paragraph 2 (a), of the Optional Protocol, the Committee must ascertain that the same matter is not being examined under another procedure of international investigation or settlement.

6.3 The Committee notes that, in the State party's view, the author has not exhausted domestic remedies, since she did not consider the possibility of bringing the matter before the investigating judge and suing for damages in criminal proceedings under articles 72 and 73 of the Code of Criminal Procedure. Furthermore, according to the State party, the author has written letters to political and administrative authorities but has not actually initiated legal action and seen it through to its conclusion by using all available remedies of appeal and judicial review. The Committee also notes the steps taken by the author and her family, including legal action, in the hope of finding the disappeared person and notes the author's argument that those steps have been limited by a real fear of reprisals. The Committee furthermore notes that, since the promulgation on 27 February 2006 of Ordinance No. 06-01 governing the application of the Charter for Peace and National Reconciliation, the family no longer has the legal right to initiate judicial proceedings.

6.4 The Committee recalls that the State party has a duty not only to carry out thorough investigations of alleged violations of human rights brought to the attention of its authorities, particularly enforced disappearances or violations of the right to life, but also to prosecute, try and punish anyone held to be responsible for such violations.[6] Mohamed Mehalli's family contacted the police, administrative and political authorities repeatedly about his disappearance, but the State party failed to conduct a thorough and rigorous investigation. The State party has also failed to provide sufficient information indicating that an effective remedy is available, since Ordinance No. 06-01 of 27 February 2006 continues to be applied, notwithstanding the Committee's recommendations that it should be brought into line with the Covenant.[7] The Committee considers that, for the purposes of admissibility of a communication, the authors must have exhausted only the remedies effective against the alleged violation, in the present case, remedies effective against enforced disappearance. The Committee considers that to sue for damages for offences as serious as those alleged in the present case cannot be considered a substitute for the charges that should be brought by the public prosecutor.[8] Moreover, given the vague wording of articles 45 and 46 of the Ordinance and, in the absence of satisfactory information from the State party about their interpretation and actual enforcement, the author's fears in respect of the effectiveness of filing a complaint are reasonable. In light of all these considerations, the Committee concludes that article 5, paragraph 2 (b), of the Optional Protocol is not an obstacle to the admissibility of the communication in the part related to the disappearance of Mohamed Mehalli.

6.5 The Committee also notes the other allegations made by the author concerning the fate of her brother Atik[9] and the ill-treatment and torture suffered by her brothers Bedrane and Abderrahmane,[10] as well as the detention of the author's mother, the author herself and her sister Soumia for 8 days in Chateauneuf barracks, and the way in which the latter two were treated. The Committee notes that the State party has presented a general argument against the admissibility of these allegations for non-exhaustion of domestic remedies. It also notes the author's explanation that the harassment and threats suffered by the family deterred them from complaining or taking any judicial action. In the absence of any clear indication by the State party of the remedies that the presumed victims should have exhausted, without any explanation of their effectiveness and availability in the general context of the present case, and in the absence of any other information relevant to the case, the Committee considers that due weight must be given to the author's allegations. It therefore declares this part of the communication admissible.

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[6] See, for example, communication No. 1791/2008, *Boudjemai v. Algeria*, Views adopted on 22 March 2013, para. 7.4.

[7] CCPR/C/DZA/CO/3, paras. 7, 8 and 13.

[8] See, for example, *Boudjemai v. Algeria*, para. 7.4.

[9] See paragraph 2.10 of the present Views.

[10] See paragraphs 2.2 and 2.8 of the present Views.

6.6 The Committee accordingly finds that the author has sufficiently substantiated her claims insofar as they raise issues under articles 7, 9, 16 and 2 (para. 3) of the Covenant in respect of the disappearance of Mohamed Mehalli. The Committee also considers that the allegations under articles 7, 9 and 10 of the Covenant concerning the treatment of other members of the family, and under article 6 of the Covenant concerning the author's deceased brother, Atik, have been sufficiently substantiated. The Committee therefore proceeds to consider the communication on the merits.

Consideration of the merits

7.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as required under article 5, paragraph 1, of the Optional Protocol.

7.2 In the present communication, the State party simply maintains that communications incriminating public officials, or persons acting on behalf of public authorities, in relation to enforced disappearances that occurred during the period in question — from 1993 to 1998 — should be considered in the broader context of the sociopolitical situation and security conditions that prevailed in the country at a time when the Government was struggling to fight terrorism. The Committee observes that the Covenant demands that the State party concern itself with the fate of every individual and treat every individual with respect for the inherent dignity of the human person. The Committee wishes to recall its jurisprudence[11] to the effect that the State party may not invoke the provisions of the Charter for Peace and National Reconciliation against persons who invoke provisions of the Covenant or who have submitted or may submit communications to the Committee. Ordinance No. 06-01, without the amendments recommended by the Committee, appears to promote impunity and therefore cannot, as it currently stands, be considered compatible with the provisions of the Covenant.[12]

7.3 The Committee notes that the State party has not replied to the author's claims concerning the merits of the case, and recalls its jurisprudence,[13] according to which the burden of proof should not rest solely on the author of a communication, especially given that the author and the State party do not always have the same degree of access to evidence and that often only the State party is in possession of the necessary information. It is implicit in article 4, paragraph 2, of the Optional Protocol that the State party has a duty to investigate in good faith all allegations of violations of the Covenant made against it and its representatives and to provide the Committee with the information available to it.[14] In the absence of any explanations from the State party in this respect, due weight must be given to the author's allegations, provided they have been sufficiently substantiated.

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[11] See, inter alia, communications No. 1196/2003, *Boucherf v. Algeria*, Views adopted on 30 March 2006, para. 11; No. 1588/2007, *Benaziza v. Algeria*, para. 9.2; No. 1781/2008, *Berzig v. Algeria*, para. 8.2; and No. 1905/2009, *Khirani v. Algeria*, Views adopted on 26 March 2012, para. 7.2.

[12] CCPR/C/DZA/CO/3, para. 7.

[13] See, for example, communication No. 1863/2009, *Maharjan v. Nepal*, Views adopted on 19 July 2012, para. 8.3.

[14] *Maharjan v. Nepal*, para. 8.3.

7.4 The Committee recognizes the degree of suffering involved in being held indefinitely without contact with the outside world. It recalls its general comment No. 20 (1992) on the prohibition of torture, or other cruel, inhuman or degrading treatment or punishment,[15] in which it recommends that States parties should make provision against incommunicado detention. It notes that, in the case in question, Mohamed Mehalli was arrested by the authorities on 29 June 1998, that he has had no contact with his family since then and that, according to his family, he was tortured in Chateauneuf military barracks shortly after his arrest. In the absence of any explanation from the State party in respect of this allegation, the Committee considers that these events constitute a violation of article 7 of the Covenant with regard to Mohamed Mehalli.[16]

7.5 The Committee also takes note of the anguish and distress caused to the author by Mohamed Mehalli's disappearance, as well as acts of harassment and ill-treatment of various members of her family. In the absence of any response from the State party on this issue, the Committee considers that the facts before it disclose a violation of article 7 of the Covenant in their respect.

7.6 In respect of the author's claims under article 9 of the Covenant that the authorities have never acknowledged her father's arrest and detention, even though the author saw him when he was detained in Chateauneuf military barracks in 1998: in the absence of any relevant information from the State party, the Committee concludes that the facts before it disclose a violation of the rights of Mohamed Mehalli under article 9 of the Covenant.

7.7 The Committee further notes that the author also invokes a violation of her father's rights under article 16 of the Covenant. It reiterates its established jurisprudence, according to which the intentional removal of a person from the protection of the law for a prolonged period of time may constitute a refusal to recognize that person as a person before the law if the victim was in the hands of the State authorities when last seen and if the efforts of his or her relatives to obtain access to potentially effective remedies, including judicial remedies (Covenant, art. 2, para. 3) have been systematically impeded.[17] In the present case, the Committee notes that the State party has not provided information on the fate or whereabouts of the disappeared person, despite the author's many requests to the State party. The Committee concludes that Mohamed Mehalli's enforced disappearance since 29 June 1998 placed him outside the protection of the law and deprived him of his right to recognition as a person before the law, in violation of article 16 of the Covenant.

7.8 The author invokes article 2, paragraph 3, of the Covenant, which imposes on States parties the obligation to ensure an effective remedy for all persons whose rights under the Covenant have been violated. The Committee attaches importance to the establishment by States parties of appropriate judicial and administrative mechanisms for addressing claims of rights violations. It refers to its general comment No. 31 on the nature of the general legal obligation imposed on States parties to the Covenant,[18] which provides, inter alia, that a failure by a State party to investigate allegations of violations could, in and of itself, give rise to a separate breach of the Covenant. In the present case, the author and her family contacted the competent authorities regarding Mohamed Mehalli's disappearance as soon as he was arrested. However, all their efforts were to no avail and the State party failed to conduct a thorough and rigorous investigation into his disappearance. Furthermore, the absence, since the promulgation of Ordinance No. 06-01 implementing the Charter for Peace and National Reconciliation, of the legal right to initiate judicial proceedings continues to deprive Mohamed Mehalli, the author and her family of access to any effective remedy, since the Ordinance prohibits, on pain of imprisonment, the initiation of legal proceedings to shed light on the most serious crimes, such as enforced disappearances.[19] In the light of the above, the Committee concludes that the facts before it disclose a violation of article 2 (para. 3), read in conjunction with articles 7, 9 and 16 of the Covenant with regard to Mohamed Mehalli, and of article 2 (para. 3), read in conjunction with article 7 of the Covenant, with regard to the author, her mother and her brothers and sisters.

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[15] *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40*, (A/47/40), annex VI, sect. A.

[16] *Maharjan v. Nepal*, para. 8.5.

[17] See, for example, communication No. 1781/2008, *Berzig v. Algeria*, Views adopted on 31 October 2011, para. 8.9.

[18] *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 40*, (A/59/40 (vol. I)), annex III.

7.9 The Committee then notes the author's complaint relating to the murder of her brother Atik by the police. It notes that the State party has not put forward any argument to refute the complaint. In the absence of any other relevant information, the Committee considers that that due weight must be given to the author's allegations. Accordingly, it concludes that the facts as submitted disclose the responsibility of the State party in the death of the author's brother, Atik, who was arbitrarily deprived of his life, and therefore concludes a violation of his rights under article 6, paragraph 1, of the Covenant.

7.10 In respect of the illegal detention, ill-treatment and torture suffered by the author's brothers, Bedrane and Abderahmane, the eight-day detention in Chateauneuf barracks of her mother, the author herself and her sister, Soumia, and the way in which the latter two were treated and humiliated there, and particularly the sexual abuse, a form of extreme gender-based violence, suffered by Soumia, the Committee notes that the State party has not provided any specific comments to refute these allegations. In these circumstances, the Committee considers that due weight must be given to the author's detailed allegations. Accordingly, it concludes that this part of the communication discloses a violation of the rights of the author's brothers, Bedrane and Abderrahmane, of the author's own rights and of the rights of her sisters and her mother, under articles 7 and 9 of the Covenant.

7.11 In the light of the foregoing, the Committee decides not to examine separately the author's complaints under article 10 of the Covenant.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the information before it discloses violations by the State party of articles 7, 9 and 16, and of article 2 (para. 3) read in conjunction with articles 7, 9 and 16 of the Covenant with regard to Mohamed Mehalli, and of articles 7 and 9 and article 2 (para. 3), read in conjunction with articles 7 and 9 of the Covenant, with regard to the author, her mother and her brothers, Bedrane and Abderrahmane, and her sisters; and of article 2 (para. 3) read in conjunction with article 6 (para.1) with regard to her deceased brother, Atik.

9. In accordance with article 2, paragraph 3, of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including by: (a) conducting a thorough and effective investigation into the disappearance of Mohamed Mehalli; (b) providing the author with detailed information about the results of its investigation; (c) releasing Mohamed Mehalli immediately if he is still being detained incommunicado; (d) in the event that Mohamed Mehalli is deceased, handing over his remains to his family; (e) prosecuting, trying and punishing those responsible for the violations committed; (f) providing adequate compensation to the author and her family for the violations suffered, and to Mohamed Mehalli, if he is still alive; (g) carrying out a prompt and effective investigation into the allegations of torture of the author, her sisters and her brothers, Bedrane and Abderrahmane, prosecuting and punishing the perpetrators, and providing the victims with adequate compensation, including for their illegal detention in this context;

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[19] CCPR/C/DZA/CO/3, para. 7.

and (h) carrying out a prompt and effective investigation into the exact circumstances of the death of the author's brother, Atik, with a view to the prosecution and punishment of those responsible. Notwithstanding the terms of Ordinance No. 06-01, the State party should ensure that it does not impede enjoyment of the right to an effective remedy for crimes such as torture, extrajudicial killings and enforced disappearances. The State party is also under an obligation to prevent similar violations in the future.

10. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether or not there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure for all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when a violation has been established, the Committee wishes to receive from the State party, within 180 days, information concerning the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views and disseminate them broadly in the official languages of the State party.

[Adopted in English, French and Spanish, the French text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian, as part of the present report.]

Appendix

Joint opinion of Mr. Fabián Omar Salvioli and Mr. Victor Rodríguez-Rescia

1. We share the opinion of the Committee and the conclusions that it has reached in *Mehalli v. Algeria* (communication No. 1900/2009). As we have stated on several previous occasions in similar cases,[a] we consider that, in the present instance, the Committee should have indicated that, by adopting Ordinance No. 06/01, certain provisions of which — in particular article 46 — are clearly incompatible with the Covenant, the State has failed to comply with the general obligation set forth in article 2, paragraph 2, of the Covenant. The Committee should also have found a violation of article 2, paragraph 2, read in conjunction with other substantive provisions of the Covenant. With regard to redress, we consider that the Committee should have recommended that the State bring Ordinance No. 06/01 into line with the Covenant.

2. Moreover, in the present case, the Committee should have found a violation of article 6 of the Covenant, given that the State has failed in its duty to guarantee the right to life. Had the Committee reached that conclusion, its position would have been consistent with its jurisprudence in previous cases — some involving the same State party — which involve facts and events that are identical in nature to those of the *Mehalli* case.[b] Furthermore, during the same session at which the present conclusions were adopted, in a similar case of enforced disappearance, the Committee reached a different conclusion even though the proven facts were the same.[c]

3. We have repeatedly maintained that, when faced with proven facts in a case file, the Committee's application of the Covenant should not be limited by the parties' legal arguments. Thus, the Committee has acted correctly on various occasions,[d] although on others, such as the *Mehalli* case, the Committee has decided to restrict the scope of its deliberations without providing valid reasons for doing so.

4. For reasons set out previously in similar cases, to which we refer the reader in order to avoid repeating them here, we consider that, in the present case, given the State party's adoption of Ordinance No. 06/01, the Committee should also have found a violation of article 2, paragraph 2 read in conjunction with other substantive provisions of the

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[a] See, for example, our joint opinion in *Mihoubi v. Algeria*, communication No. 1874/2009.

[b] See, for example, communications No. 1781/2008 and No. 1798/2008, *Lemmiz v. Algeria*, Views adopted on 25 July 2013.

[c] See communication No. 1889/2009, *Marouf v. Algeria*, Views adopted on 21 March 2014 (paras. 7.4 and 8).

[d] Simply by way of example, see: communication No. 1390/2005, *Koreba v. Belarus*, Views adopted on 25 October 2010; communication No. 1225/2003, *Eshonov v. Uzbekistan*, Views adopted on 22 July 2010, para. 8.3; communication No. 1206/2003, *R.M. and S.I. v. Uzbekistan*, Views adopted on 10 March 2010, paras. 6.3 and 9.2, with a finding of no violation; communication No. 1520/2006, *Mwamba v. Zambia*, Views adopted on 10 March 2010; communication No. 1320/2004, *Pimentel et al. v. Philippines*, Views adopted on 19 March 2007, paras. 3 and 8.3; communication No. 1177/2003, *Ilombe and Shandwe v. Democratic Republic of the Congo*, Views adopted on 17 March 2006, paras. 5.5, 6.5, and 9; communication No. 973/2001, *Khalilova v. Tajikistan*, Views adopted on 30 March 2005, para. 3.7; and communication No. 1044/2000, *Shukurova v. Tajikistan*, Views adopted on 17 March 2006, para. 3.

Covenant.[e] Consequently, in the paragraph on redress, the Committee should have recommended that the State party bring Ordinance No. 06/01 into line with the Covenant.

5. This would be consistent with the Committee's own reasoning in the present case, in which it states that: "Ordinance No. 06/01, without the amendments recommended by the Committee, appears to promote impunity and therefore cannot, as it currently stands, be considered compatible with the provisions of the Covenant."[f] After such a categorical statement, it is incomprehensible that the Committee has failed to indicate that, in order to redress the violation, the Ordinance should be amended to bring it into line with the Covenant.

6. Lastly, we wish to express our satisfaction that the Committee, for the first time in its history when dealing with an individual communication, has stated that the treatment of a woman who was raped (a sister of the petitioner) constitutes an form of extreme gender-based violence.[g]

7. This sort of analysis, based on a gender perspective, represents a step forward in the exercise of the jurisdiction of a body such as the Committee. It should have led to the establishment of adequate redress in the form of education and training for law enforcement officials on gender issues and women's rights in order to ensure the non-recurrence of such events.

[Done in English, French and Spanish, the Spanish text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

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[e] See our joint opinion in the *Mihoubi v. Algeria* case.

[f] See paragraph 7.2, in fine, of the present Views.

[g] See paragraph 7.10 of the present Views.

Y. Communication No. 1903/2009, *Youbko v. Belarus* (Views adopted on 17 March 2014, 110th session)*

Submitted by:	Galina Youbko (not represented by counsel)
Alleged victim:	The author
State party:	Belarus
Date of communication:	18 February 2009 (initial submission)
Subject matter:	Right to impart information; denial of authorization to organize a peaceful meeting
Procedural issue:	Exhaustion of domestic remedies
Substantive issues:	Right to freedom of expression; right of peaceful assembly
Articles of the Covenant:	19; 21
Article of the Optional Protocol:	2; 5, paragraph 2 (b)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 17 March 2014,

Having concluded its consideration of communication No. 1903/2009, submitted to the Human Rights Committee by Ms. Galina Youbko under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author is Ms. Galina Youbko, a Belarusian national born in 1957. She claims to be a victim of a violation, by Belarus, of her rights under articles 19 and 21 of the International Covenant on Civil and Political Rights.[1]

The facts as submitted by the author

2.1 On 19 January 2007, the author, on her own behalf and on behalf of other women whose husbands, sons or other relatives had allegedly been convicted unlawfully, filed an application with the Minsk City Executive Committee requesting to hold a picket from 10 to 13 February 2007, with the purpose of drawing the attention of the public to the need for the judiciary to respect the Constitution and international treaties ratified by the State party when adjudicating civil or criminal cases. In her application, the author specified that 50 women would participate in the picket, which would take place from 11 a.m. to 6 p.m., and that they would display posters with slogans such as "For Justice", "The President – Guarantor of Constitutional Rights", "We Are Against Bureaucracy in Courts and the Prosecutor's Office", and "Why Are Innocent People Convicted and Real Murderers Remain Free?", among others.

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* The following members of the Committee participated in the examination of the present communication: Mr. Yadh Ben Achour, Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Walter Kälin, Ms. Zonke Zanele Majodina, Mr. Gerald L. Neuman, Sir Nigel Rodley, Mr. Victor Manuel Rodríguez-Rescia, Mr. Fabián Omar Salvioli, Ms. Anja Seibert-Fohr, Mr. Yuval Shany, Mr. Konstantine Vardzelashvili, Ms. Margo Waterval and Mr. Andrei Paul Zlătescu.

[1] The Optional Protocol entered into force for the State party on 30 December 1992.

2.2 The application was reviewed by the Deputy Chair of the Minsk City Executive Committee, who, on 2 February 2007, refused to allow the picket to be held, as its purpose was considered to be an attempt to question court decisions, and, therefore, to influence court rulings in specific civil and criminal cases, in violation of article 110 of the Constitution.

2.3 On 27 February 2007, the author appealed this refusal to the Moscow District Court of Minsk, stressing that the planned picket concerned civil and criminal cases that had already been examined by all court instances, including under the supervisory review proceedings, and had thus become final. On 3 April 2007, the District Court rejected her appeal, finding the Executive Committee's justification for the refusal to be grounded and lawful.

2.4 On an unspecified date, the author appealed to Minsk City Court against the decision of the Moscow District Court, noting that the relevant national legislation prohibited the influencing of courts during the process of adjudication and deciding on cases, and reiterating that the picket would have concerned cases that had already been examined by all court instances, including under the supervisory review proceedings. On 10 May 2007, Minsk City Court upheld the lower court's decision. On an unspecified date, the author appealed against the decision of 10 May 2007 to the Chair of Minsk City Court through the supervisory review proceedings but her request for a supervisory review was rejected on 7 July 2007. Subsequently, she filed two additional applications for a supervisory review with the Chair of the Supreme Court, without success. On an unspecified date, she also tried, unsuccessfully, to complain to the Constitutional Court.

The complaint

3. The author claims that by refusing her request to hold a picket, together with others, which was aimed at expressing opinions, the authorities violated her rights to freedom of expression and to peaceful assembly as guaranteed under articles 19 and 21 of the Covenant.

State party's observations on admissibility

4.1 On 23 November 2009, the State party challenged the admissibility of the communication, arguing that the author had failed to exhaust all available domestic remedies. It recalls the facts of the case concerning the author's application to hold a picket, and its subsequent refusal by the Minsk City Executive Committee.

4.2 The State party notes that the author unsuccessfully appealed the refusal through appellate, cassation and supervisory review proceedings. In this connection, it points out that the appeal through supervisory review proceedings was submitted to Minsk City Court and to the Supreme Court. However, the author has not requested the Prosecutor General to initiate supervisory review proceedings concerning a decision that has entered into force, as provided for under article 438, paragraph 5, of the Civil Procedure Code.

Author's comments on the State party's observations on the admissibility

5. On 28 January 2010, the author listed all of the complaints and appeals that she had made in relation to her request to hold a picket in February 2007, as well as the replies of the different authorities thereto. She emphasizes that she complained to all possible court instances, including to the Supreme Court, but that all her appeals were rejected. According to her, in the circumstances, complaining to the Prosecutor General's Office via the supervisory review proceedings would have been ineffective, as under article 439 of the Civil Procedure Code, a prosecutor's protest motion to have a case examined via the supervisory review proceedings would have been sent for consideration to a court authorized to decide on whether to satisfy or reject the request. Therefore, in addition to not being an effective remedy, complaining to the Prosecutor's Office would have only resulted in further delaying the proceedings in this case.

State party's further observations

6. In a note verbale dated 25 January 2012, the State party affirmed that by adhering to the Optional Protocol to the Covenant, it had recognized the Committee's competence under article 1 thereof, to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by the State party of any of the rights set forth in the Covenant. This recognition of competence is made in conjunction with other provisions of the Optional Protocol, including those setting up criteria regarding the petitioners and admissibility, particularly articles 2 and 5, paragraph 2. States parties have no obligation under the Optional Protocol to recognize the Committee's rules of procedure and its interpretation of the Optional Protocol's provisions. According to the State party, this means that in the context of the communication procedure, States parties should be guided first and foremost by the provisions of the Optional Protocol, and that references to the Committee's long-standing practice, methods of work and case law "are not subject to the Optional Protocol". Furthermore, it submits that any communication registered in violation of the provisions of the Optional Protocol will be viewed by the State party as incompatible with the Optional Protocol and will be rejected without observations on the admissibility or on the merits. The State party maintains that decisions taken by the Committee on such "declined communications" will be considered by its authorities as "invalid".

Issues and proceedings before the Committee

The State party's failure to cooperate

7.1 The Committee notes the State party's assertion that there are no legal grounds for consideration of the author's communication, insofar as it is registered in violation of the provisions of the Optional Protocol; that it has no obligations regarding recognition of the Committee's rules of procedure and regarding the Committee's interpretation of the Optional Protocol's provisions; and that if a decision is taken by the Committee on the present communication, it will be considered "invalid" by the State party's authorities.

7.2 The Committee recalls that under article 39, paragraph 2, of the Covenant, it is empowered to establish its own rules of procedure, which the States parties have agreed to recognize. Moreover, it observes that, by adhering to the Optional Protocol, a State party to the Covenant recognizes the competence of the Human Rights Committee to receive and consider communications from individuals claiming to be victims of violations of any of the rights set forth in the Covenant (preamble and art. 1). Implicit in a State's adherence to the Optional Protocol is an undertaking to cooperate with the Committee in good faith so as to permit and enable it to consider such communications, and after examination to forward its views to the State party and to the individual (art. 5, paras. 1 and 4). It is incompatible with these obligations for a State party to take any action that would prevent or frustrate the Committee in its consideration and examination of the communication, and in the expression of its Views.[2] It is for the Committee to determine whether a communication should be registered. The Committee observes that, by failing to accept the competence of the Committee to determine whether a communication shall be registered and by declaring beforehand that it will not accept the determination of the Committee on the admissibility or the merits of such a communication, the State party violates its obligations under article 1 of the Optional Protocol.[3]

Consideration of admissibility

8.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the case is admissible under the Optional Protocol to the Covenant.

8.2 The Committee has ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

8.3 The Committee notes that the State party has challenged the admissibility of the communication for non-exhaustion of domestic remedies under article 5, paragraph 2 (b), of the Optional Protocol on the grounds that the author has not requested the Prosecutor General's Office to have her case considered under the supervisory review proceedings. However, the Committee notes that the State party has not shown whether the supervisory review proceedings have been successfully applied in cases concerning the right to freedom of expression and the right to peaceful assembly. The Committee also notes the author's claim that in the circumstances of the case, the supervisory review proceedings would have been ineffective and would have resulted in delaying the case, given that under article 43⁹ of the Civil Procedure Code, the prosecutor's protest motion would have been sent for consideration by the same court that had already examined her complaint. The Committee recalls its jurisprudence, according to which the State party's supervisory review proceedings, which allow for the review of court decisions that have taken effect, do not constitute a remedy that has to be exhausted for the purposes of article 5, paragraph 2 (b), of the Optional Protocol.[4] Accordingly, the Committee considers that it is not precluded by the requirements of article 5, paragraph 2 (b), of the Optional Protocol from examining the present communication.

8.4 The Committee considers that the author's claims under article 19 and article 21 of the Covenant are sufficiently substantiated for the purposes of admissibility, declares them admissible and proceeds to their examination on the merits.

Consideration of the merits

9.1 The Human Rights Committee has considered the present communication in light of all the information made available to it by the parties, as required under article 5, paragraph 1, of the Optional Protocol.

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[2] See, inter alia, communication No. 869/1999, *Piandiong et al. v. the Philippines*, Views adopted on 19 October 2000, para. 5.1.

[3] See, for example, communication No. 1226/2003, *Korneenko v. Belarus*, Views adopted on 20 July 2012, paras. 8.1 and 8.2; and communication No. 1948/2010, *Turchenyak et al. v. Belarus*, Views adopted on 24 July 2013, paras. 5.1. and 5.2.

[4] See, for example, communication No. 1785/2008, *Oleshkevich v. Belarus*, Views adopted on 18 March 2013, para. 7.3; communication No. 1784/2008, *Schumilin v. Belarus*, Views adopted on 23 July 2012, para. 8.3; communication No. 1814/2008, *P.L. v. Belarus*, decision of inadmissibility, 26 July 2011, para. 6.2.; and communication No. 1839/2008, *Komarovsky v. Belarus*, Views adopted on 25 October 2013, para. 8.3.

9.2 The first issue before the Committee is whether the prohibition on holding a picket, in February 2007, to display posters with specific slogans calling for justice, with the purpose of drawing the attention of the public to the need for the judiciary to comply with the Constitution and the provisions of international treaties ratified by the State party when adjudicating civil and criminal cases, constitutes a violation of the author's rights under article 19, paragraph 2, and article 21, of the Covenant.

9.3 The Committee recalls that article 19, paragraph 2, of the Covenant requires States parties to guarantee the right to freedom of expression, including the freedom to impart information. The Committee refers to its general comment No. 34 (2011) on freedoms of opinion and expression, according to which freedom of opinion and freedom of expression are indispensable conditions for the full development of the person. They are essential for any society and constitute the foundation stone for every free and democratic society.[5] Any restrictions on the exercise of these freedoms must conform to strict tests of necessity and proportionality.[6] Restrictions must be applied only for those purposes for which they were prescribed and must be directly related to the specific need on which they are predicated.[7]

9.4 The Committee notes that the refusal to permit the holding of a picket aimed at displaying posters to attract public attention to a specific topic, in this case the work of the judiciary, amounted to a restriction on the exercise of the author's right to impart information and on the exercise of her right to freedom of assembly. Therefore, the issue before it is to verify whether the restrictions imposed on the author's rights in the present communication are justified under any of the criteria as set out in article 19, paragraph 3, and in the second sentence of article 21, of the Covenant.

9.5 The Committee recalls that article 19, paragraph 3, of the Covenant allows certain restrictions, but only as provided by law and necessary (a) for respect of the rights or reputations of others; or (b) for the protection of national security or of public order (ordre public), or of public health or morals. It also recalls that the second sentence of article 21 of the Covenant requires that no restrictions be placed on the exercise of the right to peaceful assembly other than those imposed (a) in conformity with the law and (b) which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. The Committee notes that if the State imposes a restriction, it is for the State party to demonstrate that the restriction on the rights under article 19, paragraph 2, and article 21, of the Covenant was necessary in the case in question, and that even if, in principle, States parties may introduce a system aimed at reconciling an individual's freedom to impart information and to participate in a peaceful assembly with the general interest of maintaining public order in a certain area, the system must not operate in a way that is incompatible with the object and purpose of articles 19 and 21 of the Covenant.[8]

9.6 The Committee notes that the State party has submitted no observations on the merits of the present communication. However, the Committee points out that the author was refused permission by the State party's local authorities to display posters calling for justice during a picket that was aimed at drawing public attention to the need for the judiciary to respect both the Constitution and international treaties ratified by the State party when adjudicating civil and criminal cases, by restricting her right to impart her opinions regarding the administration of justice in the State party and to participate in a peaceful assembly, together with others. It notes that the authorities' refusal was based on the grounds that the purpose of the picket was seen by the authorities as an attempt to question court decisions, and, therefore, to influence court rulings in specific civil and criminal cases in violation of article 110 of the Constitution. The Committee notes, however, that the local authorities have not explained how, in practice, criticism of a general nature regarding the administration of justice would jeopardize the court rulings at issue, for the purposes of one of the legitimate aims set out in article 19, paragraph 3, or in the second sentence of article 21, of the Covenant.

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[5] See the Committee's general comment No. 34 (2011) on freedoms of opinion and expression, para. 2, *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 40*, vol. I A/66/40 (Vol. I)), annex V.

[6] Ibid., para. 22.

[7] Ibid., para. 22. See also, for example, communication No. 1948/2010, *Turchenyak et al. v. Belarus*, Views adopted on 24 July 2013, para. 7.7.

[8] See, for example, communication No. 1948/2010, *Turchenyak et al. v. Belarus*, Views adopted on 24 July 2013, para. 7.8.

9.7 In this regard, the Committee notes that the State party has failed to explain, for the purposes of article 19, paragraph 3, and the second sentence of article 21, of the Covenant, why it was necessary to restrict the author's right to express opinions by refusing her permission to hold the picket at issue – for respect of the rights or reputations of others, for the protection of national security or of public order (ordre public), or of public health or morals.

9.8 In the circumstances, and in the absence of any information in this regard from the State party to justify the restriction for the purposes of article 19, paragraph 3, and the second sentence of article 21, the Committee concludes that the author's rights under article 19, paragraph 2, and article 21, of the Covenant have been violated.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the information before it discloses a violation by the State party of the author's rights under article 19, paragraph 2, and article 21, of the Covenant.

11. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including adequate compensation. The State party is also under an obligation to take steps to prevent similar violations in the future.

12. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether or not there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when a violation has been established, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views, and to have them widely disseminated in Belarusian and Russian in the State party.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Z. Communication No. 1908/2009, *Ostavari v. Republic of Korea* (Views adopted on 25 March 2014, 110th session)*

Submitted by:	Iraj Ostavari (represented by counsel, Jong Chul Kim)
Alleged victim:	The author
State party:	Republic of Korea
Date of communication:	19 October 2009 (initial submission)
Subject matter:	Deportation of a Christian convert to the Islamic Republic of Iran
Procedural issue:	Exhaustion of domestic remedies; insufficient substantiation
Substantive issues:	Risk of torture and other cruel, inhuman or degrading treatment or punishment upon return to country of origin; arbitrary detention
Articles of the Covenant:	7; 9 (para. 4)
Article of the Optional Protocol:	2; 5 (para. 2 (b))

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 25 March 2014,

Having concluded its consideration of communication No. 1908/2009, submitted to the Human Rights Committee by Iraj Ostavari under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The author of the communication is Iraj Ostavari, an Iranian national born in 1965, held at the time of submission in the Hwaseong detention centre for foreigners, awaiting deportation to the Islamic Republic of Iran. He claims that his rights under article 7 of the Covenant would be violated if he were to be deported to the Islamic Republic of Iran. He further claims that the State party breached article 9 of the Covenant in his regard. The author is represented.

1.2 On 21 October 2009, the Special Rapporteur on new communications and interim measures, acting on behalf of the Committee, decided to issue a request for interim measures under rule 92 of the Committee's rules of procedure, requesting the authorities of the State party to refrain from deporting the author while his case is under consideration before the Committee, and to guarantee the regular judicial review of his administrative detention. The Committee's request was granted.

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* The following members of the Committee participated in the examination of the present communication: Mr. Yadh Ben Achour, Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, Mr. Cornelis Flinterman, Mr. Walter Kälin, Mr. Yuji Iwasawa, Ms. Zonke Zanele Majodina, Mr. Gerald L. Neuman, Sir Nigel Rodley, Mr. Victor Manuel Rodríguez-Rescia, Mr. Fabián Omar Salvioli, Ms. Anja Seibert-Fohr, Mr. Yuval Shany, Ms. Margo Waterval and Mr. Andrei Paul Zlătescu.

The facts as presented by the author

2.1 The author was born a Muslim in the Islamic Republic of Iran. His interest in Christianity grew when he started listening to an international Christian radio programme called *Voice of Hope*. The author came to the Republic of Korea on 30 May 2005 with a "C-2" short-term business visa, valid for three months. While there, he started attending Kurdish services at Shin-Kwang Church, where he developed a Christian faith, studied the Bible and converted to Christianity. On 4 November 2005, he was arrested by prosecutors on a charge of cannabis consumption, and the court sentenced him to 10 months of imprisonment,[1] with a two-year suspension of the sentence.

2.2 Subsequent to his sentence, a deportation order was adopted against the author,[2] and he was placed in detention in the Hwaseong detention centre on 12 December 2005. The grounds for his detention were not related to his criminal sentence, but to the execution of the deportation order issued against him, based on article 46 of the Immigration Control Act. According to article 63 of the Act, if it is impossible to immediately repatriate an individual who is subject to an order for his or her deportation from the Republic of Korea, the person may be placed in detention in a foreigner internment room or camp or another place designated by the Minister of Justice until the repatriation is possible.

2.3 While detained in the detention centre for foreigners in Hwaseong, the author applied for refugee status, on 28 December 2005. The Ministry of Justice rejected his application on 10 March 2006, on the ground that the author did not establish a "well-founded fear of being persecuted" under article 1 of the 1951 Convention relating to the Status of Refugees. On 23 June 2006, the Ministry of Justice rejected his appeal, finding that the initial decision was "justified". According to the author, the Ministry of Justice intentionally deleted, in the text of the decision, the last sentence providing that the author could file an administrative appeal against the decision within 90 days of his notification of the decision. Accordingly, the author did not appeal the decision within the statutory deadline.

2.4 During his continuing detention, the author further developed his Christian faith, and members of the Shin-Kwang Church visited him periodically. On 10 July 2006, he decided to make his Christian faith public by being baptized.

2.5 On 13 October 2006, when the author could no longer challenge the rejection of his asylum by the Ministry of Justice, the Immigration Office invited an official from the Iranian Embassy to visit the author and to issue a new passport so as to allow his repatriation. During the interview with the official from the Iranian embassy, the author stated that he had converted to Christianity and that he had no intention to return to the Islamic Republic of Iran, when asked to reconvert to the Muslim faith.

2.6 On 20 February 2007, the author submitted a new application for refugee status, which was rejected on 20 April 2007 on the grounds that: his statements were untrustworthy and contradicted by the minister who baptized him, specifically with respect to the reason why the author sought to be baptized after his first asylum application was denied; the Iranian diplomat did not comment on the author's conversion, which suggests that the Iranian Embassy does not recognize that conversion; and only persons involved in active religious missions are at risk of persecution in the Islamic Republic of Iran. The author, who is not involved in missionary work, would be able to live his ordinary religious life in the Islamic Republic of Iran, including going to Sunday service, without risk.

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[1] No date provided.

[2] The deportation order is dated 12 December 2005, but does not state a date of deportation.

2.7 On 25 May 2007, the author's appeal was rejected. On 3 July 2007, the author filed a further administrative appeal, in which he submitted evidence showing that Iranians who had converted to Christianity would be persecuted on return to the Islamic Republic of Iran. The author submitted a document dated 9 October 2007, prepared by the Office of the United Nations High Commissioner for Refugees in Seoul at the request of the Presiding Judge of the Seoul Administrative Court. That document indicates that "according to the sources, a governmental agency, the United Nations and a non-governmental organisation, Muslims who convert to Christianity may suffer in the Islamic Republic of Iran from societal discrimination and, in some instances, persecution, especially if they engage in proselytizing". In his application, the author also relied on the fact that the Iranian Embassy knew that he had converted to Christianity, through the embassy official who had visited him. He also submitted his personal diary as evidence of the genuine nature of his conversion to Christianity.

2.8 The author's administrative appeal was rejected on 22 January 2008, principally on the following grounds: his entry into the Republic of Korea seemed to be based on economic reasons; he was baptized after his initial refugee status application was rejected; it is difficult to accept, based only on the author's statement that he informed the Iranian embassy official about his conversion, that the Iranian authorities are aware of the conversion; and, despite the fact that conversion to Christianity is the subject of government oppression and discrimination in education and economic activities in the Islamic Republic of Iran, simple conversion rarely leads to criminal prosecution, unless a person is actively engaged in proselytizing Christianity to the public. Therefore, the author failed to show a well-founded fear that he would be persecuted on return to the Islamic Republic of Iran. The author appealed that decision before the Seoul High Court, but his claim was rejected on 11 November 2008. He lodged a further appeal before the Supreme Court, which was rejected on 26 February 2009. The author claims that he has exhausted domestic remedies.

2.9 On 31 March 2009, the author received the visit of another official from the Iranian Embassy in Seoul, who tried to persuade him to reconvert to Islam.

2.10 Regarding the exhaustion of domestic remedies, the author submits that, as far as his asylum proceedings are concerned, his last appeal was considered by the Supreme Court, which rejected it on 26 February 2009. Consequently, he claims that no further recourse to appeal is available to him. The author further observes that a procedure for filing an objection against the Ministry of Justice, under article 60 of the Immigration Control Act, would potentially have been available if he had availed himself of the procedure within seven days after the notification of the order. Similarly, a procedure for revocation litigation on the deportation order, under article 20 of the Administrative Litigation Act, would potentially have been open to the author. However, he missed the statutory deadlines to file such an appeal, which is 90 days after the notification of the deportation order. Consequently, he submits that neither of those two avenues were available to him.

2.11 The author further submits that a declaratory action for the affirmation of nullity of the deportation order was in principle available to him, but it is not effective. That procedure does not provide for a time limit, unlike that of the revocation litigation. Nonetheless, the constant jurisprudence of administrative courts shows that only orders with significant and objectively clear defects at the moment of their issuance may be annulled. The deportation order was issued under article 46 of the Immigration Control Act, when the Ministry of Justice was not aware of the author's conversion to Christianity.

Therefore, the procedure would not have been effective since the deportation order did not have significant and objectively clear defects at the time of its issuance.

2.12 With respect to his detention, the author submits that the procedures on revocation litigation or objection to the Ministry of Justice were not available, as he missed the statutory deadlines while pursuing his asylum procedure. As to the procedure of declaratory action for the affirmation of nullity of the detention order, the detention order issued on 12 December 2005 was adopted pursuant to article 63 of the Immigration Control Act. The author contends that his detention was not arbitrary from the beginning of his initial detention, but became arbitrary over time, as it was not subjected to periodic judicial review. As his detention is linked to the enforcement of the deportation order, a declaratory action for the affirmation of nullity of the detention order would only have been successful if the deportation order itself was found to be invalid, through a procedure which the author described as ineffective. Also, the detention order itself, when adopted, did not have significant and objectively clear defects. Consequently, this procedure would not be effective.

The complaint

3.1 The author claims that the State party would breach article 7 of the Covenant should it deport him, as the Iranian authorities are aware of his conversion, and will subject him to torture, or even to a death sentence,[3] as the Iranian Penal Code was amended in 2008 to impose the death penalty on any Iranian male who abandons the Islamic faith.[4]

3.2 The author further stresses that he has been detained at the Hwaseong detention centre since 12 December 2005. His detention will be indefinite as long as the deportation order is neither revoked nor withdrawn, since article 63 of the Immigration Control Act provides that "if it is impossible to immediately repatriate a person who is subject to a deportation order, out of the Republic of Korea" the person may be detained "until the repatriation is possible". Since 27 February 2009 (when the final decision of the Supreme Court on his refugee case was adopted), the author has been in detention without judicial review, pending the execution of the deportation order against him.[5] Consequently, he submits that the State party has breached article 9 in his regard.

State party's observations on admissibility

4.1 On 11 January 2010, the State party submitted observations on the admissibility of the communication. It contends that the author has failed to exhaust domestic remedies to challenge both the deportation order and the legality of his administrative detention. With respect to the deportation order, the author was entitled, under article 60 of the Immigration and Control Act, to file an objection against the Minister of Justice within seven days of receipt of the order. It was also open to the author to file an administrative litigation under the Administrative Litigation Act, seeking the revocation of the deportation order, within 90 days of the receipt of its notification.

4.2 The State party further submits that under article 64 (2) (iv) of the Immigration Control Act, the author may request to be deported to another country, other than the

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[3] The author does not explicitly refer to article 6 of the Covenant.

[4] The author refers to the following reports: Country of Origin Research and Information, "Status of Christian converts that do not try to proselytize or those who are not active pastors in Iran" (24 November 2008), and United States Commission on International Religious Freedom, *Annual Report 2009*, pp. 32–38.

[5] This was at the time of submission of his communication before the Committee. The author was thereafter temporarily released. See the State party's observations on admissibility (para. 4.3).

Islamic Republic of Iran. As the author has agreed to avail himself of that procedure, the State party allowed him sufficient time to undertake consultations with a third country. The author is currently in consultations with a third country regarding his possible deportation to that country.[6]

4.3 With respect to the author's allegations of arbitrary detention, the State party recalls that the author was detained pursuant to article 63 (1) of the Immigration Control Act and article 78 (1) of the Enforcement Decree of the Act, which provide that an individual may be placed in the custody of a foreigner protection office, a foreigner detention centre, or any other place designated by the Minister of Justice, upon the issuance of a deportation order, if the individual cannot be deported promptly. A deportation order was issued on 12 December 2005 with respect to the author. At that time the author was placed in the custody of the Hwaseong detention centre, where he remained until he was temporarily released on 20 November 2009.

4.4 The State party submits that within 90 days upon being notified of the deportation order of 12 December 2005, the author could have filed an administrative litigation seeking the revocation of the order. In addition, the author may also have filed an objection to his custody against the Minister of Justice at any time during his custody, based on article 55 of the Immigration Control Act. Had the objection been dismissed, he could have filed an administrative litigation seeking the revocation of such negative decision within 90 days of receiving notice of the negative decision. The author filed an objection to challenge his custody on 18 August 2009. The objection was dismissed on 3 November 2009, but the author did not file an administrative litigation to challenge the decision.

4.5 The State party further notes that under article 65 of the Immigration Control Act, any person in custody before the execution of a deportation order may also seek from the Government a temporary release. If the request is dismissed, an administrative litigation under the Administrative Litigation Act, seeking the revocation of the decision, may be filed within 90 days of the receipt of the notice of the decision. In the present case, the author's request of 20 November 2009 for temporary release was accepted by the head of the Seoul Immigration Office, and the author remains on temporary release from custody.

4.6 The State party therefore maintains that the author was given the opportunity to have the legality of his detention reviewed judicially, and continues to have the opportunity to challenge the negative decision of 3 November 2009. Consequently, he has failed to exhaust domestic remedies.

Author's comments on the State party's observations on admissibility

5.1 On 20 April 2010, the author responded to the State party's observations. He submits that the procedures under the Immigration Control Act and under the Administrative Litigation Act referred to by the State party to challenge his deportation order are not available, as they must be filed within 7 and 90 days of the notice of the deportation order, respectively. Since the order was adopted on 12 December 2005, neither of those procedures is now available to the author.

5.2 With respect to the objection and the administrative litigation against the Minister of Justice, neither is an effective remedy, because the reasons for which the deportation would constitute a violation of the principle of non-refoulement materialized after the author was baptized, that is, after 10 July 2006. Therefore, when those remedies were available, the deportation order would not have been revoked because it had been decided that the author would be deported because of his conviction for drug use. After he was baptized and thus feared that he would be tortured upon return to the Islamic Republic of Iran, those remedies were no longer available.

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[6] The country in question is Turkey. See para. 5.4.

5.3 Regarding the revocation of the deportation order itself, this would not have offered the author a stable status in the State party, as he may have been subjected to de facto refoulement. The only effective protection he could seek was via the asylum proceedings, which he pursued. Not a single asylum seeker in the State party has filed an objection/litigation for revocation of a deportation order, as it is not an effective remedy.

5.4 With respect to ongoing consultations with third countries, the author submits that those are indefinite consultations, devoid of legal binding force. Also, the author insisted on being deported to a non-Muslim country, but the State party continued to suggest Turkey as a third-country alternative. According to the author, Turkey has engaged in detention and forcible returns of refugees to the Islamic Republic of Iran.[7] Therefore, the author concludes that consultations with third countries are not an available or effective remedy which he should be asked to exhaust.

5.5 As for the State party's arguments on the remedies available to challenge his detention, the author stresses that it was neither necessary nor efficient for him to file an administrative litigation within 90 days of the detention order as, at the time, his detention was not arbitrary. It only became so after two to three years without periodic judicial review. At that point, the above-mentioned remedy was no longer available to him.

5.6 As for his action before the Ministry of Justice, filed on 23 August 2009,[8] to challenge his custody, the author submits that the procedure was unduly prolonged, as the Ministry had still not decided on his application when he filed his communication before the Committee on 19 October 2009.[9] In addition, the author did not receive notification of the negative decision of 3 November 2009 referred to by the State party.

5.7 Finally, the author submits that his temporary release does not change his allegations, as he could be detained solely upon the State party's wishes.

State party's observations on the merits

6.1 On 21 April 2010, the State party submitted observations on the merits of the communication. It reiterates that consultations with a third country are ongoing for the deportation of the author, and that it is, in the meantime, withholding the enforcement of the deportation order against the author until a decision is reached. Consequently, the author's fear that he will be subjected to torture or ill-treatment is not justified.

6.2 The State party further submits that even if the author was deported to the Islamic Republic of Iran, he would not be exposed to torture or to cruel, inhumane or degrading treatment or punishment. On 22 January 2008, the Seoul Administrative Court found that there was a lack of sufficient grounds to support the author's claim that he would be persecuted if repatriated to the Islamic Republic of Iran. On 26 February 2009, the Supreme Court confirmed that conclusion, based on the following factors: the author was not involved in Christianity-related activities in the Islamic Republic of Iran, and he had entered the Republic of Korea for economic purposes; he was baptized following the first denial of his refugee application; it is unlikely that the Islamic Republic of Iran is aware of his conversion to Christianity; it is uncommon that religious conversion itself leads to penal persecution in the Islamic Republic of Iran, unless the person actively engages in proselytism; and the existence of discrimination in educational and economic activities does not amount to persecution. Accordingly, the State party reiterates that there is no danger faced by the author in case of return to the Islamic Republic of Iran.

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[7] The author refers, inter alia, to the European Court of Human Rights decision in *Keshmiri v. Turkey*, application No. 36370/08, 13 April 2010.

[8] The State party states that this appeal was filed on 18 August 2009 (see para. 4.4).

[9] The author notes that article 55(2) of the Immigration Control Act provides that "the Minister of Justice, upon receiving an objection under paragraph 1, shall examine *without delay* [emphasis added] the relevant documents. If the request is groundless, he shall reject it by decision, and if he deems it well-grounded, he shall order by decision the foreigner released from the internment [detention]."

6.3 With respect to the author's claim under article 9 that he was arbitrarily detained, the State party reiterates that the author failed to exhaust domestic remedies. After being detained on 12 December 2005, it was not until 18 August 2009 that he filed an administrative objection against his custody. After his application was rejected, he failed to appeal the decision.

6.4 The State party further observes that the author alleges that he could not file an administrative litigation because the period for filing such application against his custody had elapsed. However, the asylum procedure and the administrative procedure regarding custody are distinct procedures, and the author could have challenged the legality of his detention irrespective of the process of his asylum claim. During the legal proceedings, the author was represented by legal counsel, which leads the State party to infer that he knowingly decided not to appeal the initial decision on the legality of his detention.

6.5 In conclusion, the State party reiterates that it is not enforcing the deportation order against the author as long as consultations on his possible deportation to a third country are ongoing.

Author's comments on the State party's observations on the merits

7.1 On 14 July 2010, the author reiterated that consultations on his possible deportation to a third country are not a legally binding process, and as such do not exclude a possible deportation of the author by the State party to the Islamic Republic of Iran. He adds that such consultations carry the inevitable risk of a prolonged detention, as there are no deadlines attached to that process under the Immigration Control Act.

7.2 Regarding the appeal procedures referred to by the State party, the author notes that an administrative litigation against a custody order within 90 days of the notice of the order is only for the determination of whether the initial custody was legitimate, and would not address the question as to whether a prolongation of the detention is justified. He adds that even if he had filed an administrative litigation within 90 days after the rejection of his objection by the Minister of Justice, this would not be an appropriate judicial measure, as he has been detained for a prolonged period, and there is no limited time frame in which the Minister of Justice must decide on appeals.

7.3 As to his temporary release, the author notes that it was granted after he filed his communication with the Committee. To extend the temporary release, he must go to the Immigration Office on a regular basis. Additionally, the Immigration Office has full discretion to revoke the decision of temporary release, or to refuse to extend it. The author could therefore be placed back in detention.

7.4 With respect to the risk incurred in case of deportation to the Islamic Republic of Iran, the author refers to the opinion of the Office of the United Nations High Commissioner for Refugees (see para. 2.7 above) and stresses that limitations on his right to proselytize would constitute an unreasonable limitation on his right to freedom of religion.

Additional submission from the author

8.1 On 5 February 2014, the author recalled that he had been released on 20 November 2009, after 47 months of detention. He stresses that during his detention, his health condition significantly deteriorated. He lost most of his teeth, and attempted to commit suicide. The fact that there are neither mental health care services, nor a dental clinic in the foreigners' detention facility where he was held only worsened the situation. The author adds that, since then, he has been unable to live without medication.[10]

8.2 The author recalls that he was released on 20 November 2009 with a surety of US$ 3,000. He then regularly extended his release every three months, by reporting in person to the immigration authorities. He stresses that his cooperation and voluntary reporting is evidence that, if he had been released rather than being kept in indefinite detention, he would not have absconded. Therefore, he reiterates his previous submission that because it was not regularly subjected to regular review, his detention was arbitrary.

8.3 In addition, the author claims that his surety of $3,000 was confiscated when he appeared before the immigration authorities on 13 December 2013 to apply for a further extension of his release, which was denied, on the ground of his failure to comply with the authorities' request to recover his lost passport from the Iranian authorities. He was accordingly re-detained on 30 December 2013, and temporarily released after paying another surety of $3,000.[11] The author submits that since the denial of the extension of his release on 13 December 2013, his health condition has worsened.

8.4 The author further submits that he has been studying theology and working for his church as a Bible teacher since his temporary release. In 2012, he received a bachelor's degree in theology from the Antioch Missions International College and Seminary.

Additional submission from the State party

9.1 On 13 February 2014, the State party submitted an update on the author's situation. It recalled that the Government allowed the author to stay in the country and withheld the execution of the deportation order, as requested by the Committee in 2009. After his release from detention on 20 November 2009, the author regularly applied for extensions of his temporary release.

9.2 The State party also recalls that when the Supreme Court finally denied the author's application for refugee status in 2009, the Seoul Immigration Office informed the author that he could depart to a third country instead of the Islamic Republic of Iran. Accordingly, the author was granted sufficient time to carry out consultations with a third country. The State party did not refer to any specific country.

9.3 The author has continued his studies at a seminary for foreigners in the Republic of Korea, and will graduate in March 2014. The president of the seminary attended by the author has pledged to support the latter in leaving the Republic of Korea for Canada after graduation, and the author also formally notified the Seoul Immigration Office of his intention to depart to a third country.[12] Based on those pledges, the Immigration Office allowed the author to be released and to complete his studies, deferring the execution of the deportation order.

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[10] The author annexes a medical certificate dated 2 December 2013. The author visited the clinic on 2 September 2013 due to sleep disorder, anxiety, depression and sensitivity. The certificate provides that medical tests showed "signs of extreme stress", and that the author was prescribed antidepressant and anti-anxiety treatment, as well as psychiatric sessions to be held every two weeks. The certificate also states that the patient requires mental stability and support, and that if he is exposed to continuous stress, his symptoms are likely to increase. The author was further diagnosed with other stress-related symptoms, such as duodenal ulcer, numbness of hands and feet, migraine and muscle cramps.

[11] No date provided.

9.4 The State party recalls that the author was proved guilty in the Republic of Korea as a drug offender, and that his asylum application was dismissed after a thorough consideration of his claims by the Ministry of Justice and the Supreme Court, which found that the author was not entitled to protection based on the principle of non-refoulement.

9.5 The State party expresses concern over the consequences of the author's situation on the Government's lawful exercise of immigration control, given that although the author's legal status has been left undetermined since 2009, he has been able to pursue studies and remain on the State party's territory pursuant to the Committee's request for interim measures, despite the fact that he was denied refugee status four years ago. Therefore, the Government of the State party requests a swift decision by the Committee, based on the previous observations submitted and the author's present situation.

Issues and proceedings before the Committee

Consideration of admissibility

10.1 Before considering any claim contained in a communication, the Human Rights Committee must decide, in accordance with rule 93 of its rules of procedure, whether the communication is admissible under the Optional Protocol to the Covenant.

10.2 The Committee has ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

10.3 The Committee takes note of the author's claim that his detention is in violation of article 9, as he has been detained since 12 December 2005, and there has been no periodic judicial review of such detention for almost four years. The Committee recalls that detention in the course of proceedings for the control of immigration is not per se arbitrary, but the detention must be justified as reasonable, necessary and proportionate in the light of the circumstances, and reassessed as it extends in time.[13] The Committee notes that in the present case, the author was detained pursuant to article 63(1) of the Immigration Control Act, which provides that an individual against whom a deportation order was adopted may be placed in custody if that individual cannot be repatriated promptly. The Committee further notes the State party's argument that although he had the opportunity to do so, the author did not challenge his detention until 18 August 2009. The Committee observes that the author was represented by a legal counsel during the proceedings, and that he has not contested the fact that he could have challenged his detention earlier. The author also failed to appeal the negative decision of 3 November 2009 regarding his administrative objection to his detention. The Committee accordingly considers that the author has not exhausted domestic remedies, and concludes that this part of the communication is inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

10.4 With respect to the author's potential deportation to the Islamic Republic of Iran, the Committee notes that the State party has challenged the admissibility of the communication for non-exhaustion of domestic remedies, given the author's failure to file an administrative litigation under the Administrative Litigation Act, seeking the revocation of the deportation order, within 90 days of the receipt of its notification. It also notes the author's claim that this procedure was not effective *ratione temporis*, as the gist of his complaint, that is, the risk faced as a result of his conversion to Christianity, had not materialized during the statutory availability of this remedy, since he was baptized on 10 July 2006, and that he should have filed such appeal by March 2006. The Committee further notes that, after his conversion, the author applied for refugee status on 20 February 2007. His application was denied, on the ground that he lacked credibility and would not face persecution upon return to the Islamic Republic of Iran. The author filed several consecutive appeals, until the Supreme Court ultimately rejected his appeal on 26 February 2009. The author claims that he has no further remedy to challenge the deportation order adopted against him, and the State party has not contested this.

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[12] The State party annexes a report from the Ministry of Justice dated 11 May 2012 concerning the author's application for an extension of his release.

[13] Communication No. 560/1993, *A. v. Australia*, Views adopted on 3 April 1997, paras. 9.3–9.4.

10.5 The Committee takes note of the State party's argument that consultations on the author's settlement in a third country are ongoing, and that the latter voluntarily chose to avail himself of that procedure. The Committee further notes that a country of resettlement was suggested to the author, who was not prepared to engage in such process; and that the State party is not enforcing his deportation to the Islamic Republic of Iran pending the final outcome of the consultations. The Committee has taken note of the author's argument that such consultations are indefinite and lack legal force. The Committee observes that this procedure appears to be discretionary, is not time bound, and does not appear to have formal suspensive effect with respect to the removal. The Committee recalls its jurisprudence to the effect that authors must avail themselves of all judicial remedies in order to fulfil the requirement of article 5, paragraph 2 (b), of the Optional Protocol, insofar as such remedies appear to be effective in the given case and are de facto available to the author.[14] In the circumstances, the Committee considers that the consultations on the author's resettlement to a third country do not constitute a remedy that the author is required to exhaust under article 5, paragraph 2 (b), of the Optional Protocol.

10.6 The Committee declares the communication admissible insofar as it appears to raise issues under articles 6 and 7 of the Covenant, and proceeds to their consideration on the merits.

Consideration of merits

11.1 The Human Rights Committee has considered the communication in the light of all the information made available to it by the parties, as required under article 5, paragraph 1, of the Optional Protocol.

11.2 The Committee notes the author's claim that as he has converted to Christianity and that since the Iranian authorities are aware of that fact, he faces a real risk of being subjected to treatment contrary to article 7 of the Covenant if he were to be forcibly returned to the Islamic Republic of Iran. The author also alleged that he may be sentenced to death in the Islamic Republic of Iran, as the Penal Code imposes the death penalty on any man who has left the Islamic faith (see para. 3.1 above). The Committee took note of the State party's contention that the author's applications before domestic authorities were rejected on the ground that the author lacked credibility, a conclusion reached following, inter alia, his conversion to Christianity after his first asylum application was rejected.

11.3 The Committee recalls that, generally speaking, it is for the organs of States parties to the Covenant to review or evaluate facts and evidence in order to determine whether such risk of irreparable harm exists. Notwithstanding the deference to be given to the immigration authorities in assessing the evidence before them, the Committee must determine whether the author's removal to the Islamic Republic of Iran would expose him to a real risk of irreparable harm. In this context, the Committee recalls its general comment No. 31 (2004), in which it refers to the obligation of States parties not to extradite, deport, expel or otherwise remove a person from their territory where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed.[15]

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[14] See communications No. 1003/2001, *P.L. v. Germany*, decision of inadmissibility adopted on 22 October 2003, para. 6.5; and No. 433/1990, *A.P.A. v. Spain*, decision of inadmissibility adopted on 25 March 1994, para. 6.2.

11.4 The Committee must therefore determine whether the author's removal to the Islamic Republic of Iran would expose him to a real risk of irreparable harm under article 6, paragraph 1, and article 7 of the Covenant. The Committee observes that it is uncontested that the author converted to Christianity; and that he was visited during his detention by Iranian officials, whom he informed of his conversion. In that regard, the Committee took note of reports that indicate that although apostasy is not codified as a crime under Iranian law, it may be treated as such by prosecutors and judges to charge religious converts with apostasy, which has reportedly led to a number of arbitrary arrests,[16] imprisonment in solitary confinement, torture, convictions and even executions.

11.5 The Committee further notes that the author has obtained a bachelor's degree in theology from the Antioch Missions International College and Seminary, which is run by Antioch Missions "to spread the Gospel effectively to the unreached people groups" in Northern Africa, the Middle East and Asia.[17] The Committee takes note of the uncontested opinion, shared by the State party (para. 6.2 above), that in the Islamic Republic of Iran, Christians engaged in proselytizing are exposed to serious risks of persecution, as well as penal consequences. The Committee notes that this aspect has not been examined in the course of deportation proceedings. Thus, the State party has failed to give due consideration to the personal risk faced by the author in the Islamic Republic of Iran not only as a Christian convert, but also as a theologian with a conspicuous evangelist profile. Accordingly, the Committee is of the view that the author would be exposed to a real risk of irreparable harm under article 6, paragraph 1, and article 7 of the Covenant if he were forcibly returned to the Islamic Republic of Iran.

12. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the author's removal to the Islamic Republic of Iran would violate his rights under articles 6, paragraph 1, and article 7 of the Covenant.

13. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including a full reconsideration of his claim regarding the risk of treatment contrary to articles 6, paragraph 1, and article 7 of the Covenant should he be returned to the Islamic Republic of Iran, taking into account the obligations of the State Party under the Covenant. Furthermore, the State party should not deport the author to any third country likely to deport him to the Islamic Republic of Iran. The State party is also under an obligation to take steps to prevent similar violations in the future.

14. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether or not there has

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[15] *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 40*, vol. I (A/59/40 (Vol. I)), annex III, para. 12.

[16] Concluding observations of the Human Rights Committee on the Islamic Republic of Iran (CCPR/C/IRN/CO/3), para. 23.

[17] http://amicenter.net/en/acs/.

been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when a violation has been established, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views and to have them widely disseminated in the official languages of the State party.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

AA. Communication No. 1910/2009, *Zhuk v. Belarus* (Views adopted on 30 October 2013, 109th session)[*]

Submitted by:	Svetlana Zhuk (represented by counsel, Raman Kisliak)
Alleged victim:	Andrei Zhuk (son of the author)
State party:	Belarus
Date of communication:	27 October 2009 (initial submission)
Subject matter:	Imposition of a death sentence after unfair trial
Procedural issue:	State party's failure to cooperate and non-respect of the Committee's request for interim measures; abuse of the right to submission, insufficient substantiation of claims; non-exhaustion of domestic remedies
Substantive issues:	Arbitrary deprivation of life; torture and ill-treatment; arbitrary deprivation of liberty; right to be brought promptly before a judge; right to a fair hearing by an independent and impartial tribunal; right to be presumed innocent; right to adequate time and facilities for the preparation of his defence and to communicate with his counsel; right not to be compelled to testify against himself or to confess guilt; interim measures to avoid irreparable damage to the alleged victim; violation of obligations under the Optional Protocol
Articles of the Covenant:	6 (paras. 1 and 2), 7, 9 (para. 3), 14 (paras. 1, 2 and 3 (b), (d) and (g))
Article of the Optional Protocol:	1, 2, 3 and 5 (para. 2 (b))

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 30 October 2013,

Having concluded its consideration of communication No. 1910/2009, submitted to the Human Rights Committee by Svetlana Zhuk on behalf of her son, Andrei Zhuk, under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

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[*] The following Committee members participated in the examination of the present communication: Mr. Yadh Ben Achour, Mr. Ahmad Amin Fathalla, Mr. Kheshoe Parsad Matadeen, Sir Nigel Rodley, Mr. Fabián Omar Salvioli, Mr. Yuval Shany, Mr. Konstantine Vardzelashvili, Mr. Lazhari Bouzid, Mr. Walter Kälin, Mr. Cornelis Flinterman, Ms. Zonke Zanele Majodina, Mr. Gerald L. Neuman, Mr. Victor Manuel Rodríguez-Rescia, Ms. Anja Seibert-Fohr and Ms. Margo Waterval.

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The author of the communication is Svetlana Zhuk. She submits the communication on behalf of her son, Andrei Zhuk, a Belarusian national born in 1983, who at the time of the submission of the communication was detained on death row in Minsk, after being sentenced to death by the Criminal Division of the Minsk Regional Court on 17 July 2009. The author claims that her son is a victim of violations by Belarus of his rights under articles 6 (paras. 1 and 2), 7, 9 (para. 3), and 14, (paras. 1, 2 and 3 (b), (d) and (g)), of the International Covenant on Civil and Political Rights.[1] The author is represented by counsel, Raman Kisliak.

1.2 When registering the communication on 30 October 2009, and pursuant to rule 92 of its rules of procedure, the Committee, acting through its Special Rapporteur on new communications and interim measures, requested the State party not to carry out Mr. Zhuk's death sentence while his case was under examination by the Committee. On 7 December 2009, the Committee reiterated its request.

1.3 On 23 March 2010, the Committee received information that the author's son had been executed despite the request for interim measures. On the same date, the Committee requested urgent clarification of the matter from the State party, drawing the State party's attention to the fact that non-respect of interim measures constitutes a violation by States parties of their obligations to cooperate in good faith under the Optional Protocol to the Covenant. No response was received within the deadline. On 30 March 2010, the Committee issued a press release deploring the execution.

The facts as submitted by the author

2.1 The author submits that, at around 8 p.m. on 1 March 2009, her son was arrested in one of the cafe-bars of Soligorsk by officers of the Ministry of Internal Affairs on the suspicion of having assaulted and killed, on 27 February 2009, a man and a woman who were carrying money to pay the salaries of employees at the company they worked for. At the time of the arrest, he was under the influence of a narcotic substance. At 9.30 p.m. on the same day, he was escorted to the District Department of Internal Affairs, where he immediately requested a lawyer. The author's son was allowed to see a lawyer for five minutes only (from 10.02 to 10.07 p.m.) at the beginning of the first interrogation that lasted until 12.37 a.m. on 2 March 2009. The author claims that her son was not in a state to understand the seriousness of the proceedings, and that he was ill-treated and forced to confess that he owned the weapon of the crime and to participate in a reconstruction of the crime scene and incriminate himself. She also alleges that he was deprived of legal representation while the above actions took place, despite him requesting a lawyer.

2.2 The author's son was arrested on 1 March 2009, but his detention on remand was ordered by a prosecutor only on 10 March 2009. The prosecutor ordered the detention without even meeting with the detainee. Mr. Zhuk was not brought before a judge for a review of his detention until 6 June 2009, three months and five days after his arrest. The author maintains that the above violates domestic criminal procedure laws[2] and her son's rights under article 9, paragraph 3, of the Covenant, and refers to the jurisprudence of the Committee.[3]

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[1] The Optional Protocol entered into force for the State party on 30 December 1992.

[2] The author maintains that her son's detention was in violation of articles 107 (para. 1), 108, (paras. 1 and 3), 111, 119 (para. 2) and 126 (para. 4) of the domestic Code of Criminal Procedure.

2.3 On 17 July 2009, the author's son was found guilty under articles 139 (paras. 1, 12 and 15), 205 (part 2), 207 (part 3), 294 (part 3) and 328 (part 1) of the Criminal Code by the Criminal Division of the Minsk Regional Court and sentenced to death and confiscation of property. The author submits that her son's right to presumption of innocence was violated because he was placed in a cage and handcuffed in the courtroom for the whole duration of the examination of his criminal case by the first instance court. In the author's opinion, it shows that her son was treated as a dangerous criminal even before the verdict was handed down. In addition, State-run mass media, including the main television channel ONT, were referring to the author's son as a "criminal" from the very start of the investigation. The author specifically mentions an interview with the Minister of Internal Affairs, Mr. Naumov, of 2 March 2009, in which he called her son and his co-defendants "criminals" before they had been convicted.

2.4 The author also submits that the first instance court was prejudiced against her son, under the influence of the media and high-ranking public officials, who had already declared him guilty. She submits that, while the prosecution had charged her son with intent to commit armed robbery, the court convicted him of premeditated murder, which is a more serious crime and an accusation against which he did not have the possibility to prepare a defence.

2.5 On 21 October 2009, a lawyer representing the author's son before the Criminal Division of the Supreme Court requested Remand Unit (SIZO) No. 1 of the Ministry of Internal Affairs to provide him with a copy of his client's medical records from the moment of Mr. Zhuk's transfer for placement in custody to Prison No. 8 in Zhodino. On 26 October 2009, the lawyer received a copy of a medical certificate, from which it transpires that, during a medical examination on 16 March 2009, injuries were identified on the body of the author's son (dark blue bruises on the body). The lawyer presented the medical certificate to the cassation court together with a complaint that the author's son had been ill-treated in custody on 1 March 2009 while in pretrial detention. In that complaint, the author submits that the issues of violations of her son's rights under articles 7 and 14, paragraph 3 (g), of the Covenant were raised. The Supreme Court rejected this complaint.

2.6 On 27 October 2009, the Criminal Division of the Supreme Court rejected the author's son's appeal on cassation and upheld his death sentence. The author submits that in the cassation appeal her son raised the issues of violations of his rights under articles 6, 9 (para. 3) and 14 of the Covenant. The author maintains that in that manner all domestic remedies had been exhausted.

The complaint

3. The author submits that her son's rights under articles 6 (paras. 1 and 2), 7, 9 (para. 3) and 14 (paras. 1, 2 and 3 (b), (d) and (g)) of the Covenant, were violated by the State party, because he was subjected to an arbitrary arrest, ill-treatment after his arrest and was sentenced to death after an unfair trial.

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[3] The author refers to the Committee's Views in communications No. 852/1999, *Borisenko v. Hungary*, Views adopted on 14 October 2002; and No. 521/1992, *Kulomin v. Hungary*, Views adopted on 16 March 1994; and to general comment No. 8 (1982) on the right to liberty and security of persons (*Official Records of the General Assembly, Thirty-seventh Session, Supplement No. 40* (A/37/40), annex V).

State party's observations on admissibility and interim measures

4.1 On 1 December 2009, the State party submits that it considers the review of the author's case by the Committee unacceptable, since the initiation of a procedure before the Committee "lacks basic legal ground" under articles 2 and 5 (para. 2 (b)) of the Optional Protocol, namely the author's son failed to exhaust the domestic legal remedies in that he did not submit an application for a supervisory review by the Supreme Court. The State party submits that the submission of the author constitutes an abuse of the right to submission under article 3 of the Optional Protocol because her son failed to submit a request for a supervisory review to the Supreme Court.

4.2 The State party further submits that the alleged violations of the rights of the author's son are not supported by evidence and do not correspond to reality. It maintains that his guilt was proven beyond doubt in accordance with the domestic criminal and criminal procedure legislation. It maintains that the author's allegations under article 6 of the Covenant are unfounded, since that article permits the death penalty, with the limitation that the sentence of death shall not be imposed for crimes committed by persons under 18 years of age and shall not be carried out on pregnant women. The State party submits that its legislation limits the use of the death penalty further than the Covenant, since it can only be imposed for the most serious crime — murder with aggravated circumstances — and it cannot be imposed on women, minors and men older than 65 years of age. It maintains that, in convicting the author's son, the court took into consideration his personality and the cruelty of the murders and of the other dangerous crimes committed by him.

4.3 The State party also submits that every death penalty case is additionally reviewed by the Presidential Pardons Commission and then by the President himself.

4.4 On 21 April 2010, in response to the 30 March 2010 press release of the Committee, the State party submits that the Committee made public information regarding the case in contradiction of article 5, paragraph 3, of the Optional Protocol. The State party submits that it did not breach its commitments under the Covenant and the Optional Protocol thereto since capital punishment is not prohibited by international law and it is not a party to the Second Optional Protocol to the Covenant, aiming at the abolition of the death penalty. It further notes that it had recognized the competence of the Committee under article 1 of the Optional Protocol, but that the Committee's "attempts to pass its rules of procedure off as the international commitments of State parties … are absolutely inadmissible". It reiterated that it had not violated the Optional Protocol since: article 1 recognizes the competence of the Committee to receive and consider communications directly from individuals who claim to be victims of a right, but not from a third party; and it had cooperated with the Committee in the spirit of good will and provided it with all the relevant information on the case. It further submits that domestic legislation obliges its courts to implement immediately verdicts that have entered into force, and that the Optional Protocol does not contain provisions obliging States parties to stop the implementation of the death penalty until the review of the convict's complaints by the Committee is completed. It maintains that the position of the Committee that executions should be halted in such cases is not binding and has the "character of a recommendation". It submits that the above issue can be resolved by amending the Optional Protocol. It further submits that the State party imposes and implements capital punishment in extremely rare cases and that the issue is currently being debated in its Parliament.

Author's comments on the State party's observations

5.1 On 11 July 2012, the author submits that neither an application for presidential pardon, nor the supervisory review procedure before the Supreme Court in Belarus can be considered an effective domestic remedy under the Optional Protocol. As to the presidential pardon, the author maintains that it does not represent an effective domestic remedy that needs to be exhausted before applying to the Human Rights Committee, because it is a measure of a humanitarian nature and not a legal remedy.[4] The author further submits that, according to the Committee's established jurisprudence, the supervisory review procedure is not an effective domestic remedy that has to be exhausted, as required under the Optional Protocol, and adds that an appeal submitted under that procedure would not automatically result in the consideration of its substance. Instead a public official, usually the chair of a court, would consider the issue unilaterally and may reject the request. The author submits that this unilateral review, which does not include a public hearing, does not permit the supervisory review procedure to be treated as a remedy.

5.2 The author further submits that, although legislation provides for the possibility to file applications for supervisory review and presidential pardon, it does not regulate the length of such proceedings, nor provide for a procedure to inform the applicant of their outcome. In practice, in death penalty cases, the applicant is informed that his applications have been rejected only minutes before his execution. The outcome of such applications is also kept secret from the lawyers and families of those convicted. The author also submits that the death penalty in Belarus is administered secretly, and neither the convict, nor his lawyers or family are informed beforehand of the date of the execution. Accordingly, a person sentenced to death has no real possibility to submit a communication to the Committee after his applications for a supervisory review and presidential pardon have been rejected.

5.3 The author submits that her son had submitted an application for presidential pardon on 13 November 2009. She submits that this application was most probably rejected and describes in detail the numerous unsuccessful attempts she made to obtain information regarding her son's whereabouts and whether he had been executed, starting on 19 March 2010. She submits that the execution of her son was acknowledged by the Minister of Internal Affairs in his media statement of 2 April 2010.

5.4 The author further submits that the State party's submission was only made *in abstracto* and that it did not challenge the substance of the majority of the author's claims. As to the State party's argument that the author's invocation of an alleged violation of article 6 of the Covenant was unfounded, the author recalls that, according to the Committee's jurisprudence, the imposition of a death sentence upon conclusion of a trial in which the provisions of the Covenant have not been respected constitutes an arbitrary deprivation of life. The author notes that the State party does not contest the author's claims under articles 9 (para. 3), 7 and 14 of the Covenant.

5.5 The author also submits copies of interviews with the former head of the SIZO No. 1, providing a detailed description of how death penalties are executed; the Minister of Internal Affairs, who states inter alia that domestic legislation has priority over "norms imported from elsewhere"; and a former judge of the Minsk Regional Court, who took part in the examination of her son's case, and who describes the dependency of the judiciary on the orders received from the Office of the President.

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[4] The author refers to the Committee's jurisprudence in communications No. 1033/2001, *Singarasa v. Sri Lanka*, Views adopted on 21 July 2004, para. 6.4; No. 1132/2002, *Chisanga v. Zambia*, Views adopted on 18 October 2005, para. 6.3.

Issues and proceedings before the Committee

The State party's failure to cooperate and to respect the Committee's request for interim measures

6.1 The Committee notes the State party's submission: that there are no legal grounds for the consideration of the present communication in so far as it is registered in violation of articles 2 and 5 (para. 2 (b)) of the Optional Protocol, because the alleged victim did not present the communication himself and has failed to exhaust domestic remedies; that it has no obligations regarding the recognition of the Committee's rules of procedure and its interpretation of the provisions of the Optional Protocol; and that it has no obligation to respect the Committee's requests for interim measures.

6.2 The Committee recalls that article 39, paragraph 2, of the International Covenant on Civil and Political Rights authorizes it to establish its own rules of procedure, which the States parties have agreed to recognize. The Committee further observes that, by adhering to the Optional Protocol, a State party to the Covenant recognizes the competence of the Human Rights Committee to receive and consider communications from individuals subject to its jurisdiction claiming to be victims of a violation of any of the rights set forth in the Covenant.[5] Implicit in a State's adherence to the Optional Protocol is an undertaking to cooperate with the Committee in good faith so as to permit and enable it to consider such communications, and after examination to forward its views to the State party and to the individual concerned.[6] It is incompatible with the obligations under article 1 of the Optional Protocol for a State party to take any action that would prevent or frustrate the Committee in its consideration and examination of the communication, and in the expression of its Views.[7]

6.3 In the present case, the Committee observes that, when submitting the communication on 27 October 2009, the author informed the Committee that at that point her son was on death row. On 30 October 2009, the Committee transmitted to the State party a request not to carry out his execution while his case was under examination by the Committee. On 7 December 2009, the Committee reiterated its request. On 23 March 2010, the Committee received information that the author's son had been executed despite the interim measures request. The Committee observes that it is uncontested that the execution in question took place despite the fact that a request for interim measures of protection had been duly addressed to the State party and reiterated.

6.4 Apart from any violation of the Covenant found against a State party in a communication, a State party commits grave breaches of its obligations under the Optional Protocol if it acts to prevent or to frustrate consideration by the Committee of a communication alleging a violation of the Covenant, or to render examination by the Committee moot and the expression of its Views concerning the implementation of the State party's obligations under the Covenant nugatory and futile.[8] In the present case, the author alleges that her son was denied his rights under various articles of the Covenant. Having been notified of the communication and the Committee's request for interim measures, the State party breached its obligations under the Optional Protocol by executing the alleged victim before the Committee concluded its consideration of the communication.

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[5] Preamble and art. 1 of the Optional Protocol.

[6] Art. 5, paras. 1 and 4, of the Optional Protocol.

[7] See, inter alia, communications No. 869/1999, *Piandiong et al. v. the Philippines*, Views adopted on 19 October 2000, para. 5.1, and No. 1461, 1462, 1476 & 1477/2006, *Maksudov et al. v. Kyrgyzstan*, Views adopted on 16 July 2008, paras. 10.1–10.3.

[8] See, inter alia, communications No. 1276/2004, *Idieva v. Tajikistan*, Views adopted on 31 March 2009, para. 7.3, and No. 2120/2011, *Kovaleva and Kozyar v. Belarus*, Views adopted on 29 October 2012, para. 9.4.

6.5 The Committee further recalls that interim measures under rule 92 of its rules of procedure, adopted in accordance with article 39 of the Covenant, are essential to the Committee's role under the Optional Protocol in order to avoid irreparable damage to the victim of the alleged violation. Flouting of the rule, especially by irreversible measures, such as in the present case the execution of Mr. Zhuk, undermines the protection of Covenant rights through the Optional Protocol.[9]

6.6 The Committee notes the State party's submission that the Committee made public information regarding the case contrary to article 5, paragraph 3, of the Optional Protocol through its press release of 30 March 2010 in which it deplores the execution of the victim despite its request for interim measures. The Committee notes that the paragraph in question states that the Committee shall hold closed meetings when examining communications. The paragraph does not prevent the Committee from making public information regarding failure of the States parties to cooperate with it in the implementation of the Optional Protocol.

Consideration of admissibility

7.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

7.2 The Committee has ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

7.3 The Committee takes note of the State party's argument that the communication is inadmissible since it was submitted to the Committee by third parties and not by the alleged victim himself. In this respect, the Committee recalls that rule 96 (b) of its rules of procedure provides that a communication should normally be submitted by the individual personally or by that individual's representative, but that a communication submitted on behalf of an alleged victim may, however, be accepted when it appears that the individual in question is unable to submit the communication personally.[10] In the present case, the Committee notes that the alleged victim at the time of the submission was detained on death row; that the communication was submitted on behalf of the alleged victim by his mother and a counsel, who have presented a duly signed letter of authorization and a power of attorney for the counsel by the alleged victim to represent him before the Committee. Accordingly, the Committee is not precluded by article 1 of the Optional Protocol from examining the communication.

7.4 The State party argues that, by submitting a communication to the Committee before her son had submitted to the Supreme Court a request for a supervisory review, the author has abused her right of submission. Given the circumstances of the present case and the subsequent execution of the victim, the Committee does not see how the communication constitutes an abuse of the right of submission. The Committee further notes that this argument relates rather to the requirements of article 5, paragraph 2 (b), of the Optional Protocol. In the absence of any valid reason offered as to why the present communication constitutes an abuse of the right of submission, the Committee is of the view that the case is not inadmissible on this ground.

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[9] See, inter alia, communications No. 964/2001, *Saidova v. Tajikistan*, Views adopted on 8 July 2004, para. 4.4; No. 1280/2004, *Tolipkhuzhaev v. Uzbekistan*, Views adopted on 22 July 2009, para. 6.4; No 2120/2011, *Kovaleva and Kozyar v. Belarus*, para. 9.5.

[10] See, inter alia, communication No. 2120/2011, *Kovaleva and Kozyar v. Belarus*, para. 10.2.

7.5 The Committee takes note of the State party's argument that Mr. Zhuk had not exhausted all domestic remedies at the time of submission of the communication in view of the fact that he had not submitted an application for a supervisory review. In this regard, the Committee reiterates its previous jurisprudence, according to which the State party's supervisory review is a discretionary review process[11] and as such does not constitute an effective remedy for the purposes of article 5, paragraph 2 (b), of the Optional Protocol. Therefore, the Committee is not precluded by article 5, paragraph 2 (b), of the Optional Protocol, from considering the communication.

7.6 The Committee considers that the author's allegations under articles 6 (paras. 1 and 2), 7, 9 (para. 3) and 14 (paras. 1, 2 and 3 (b), (d) and (g)) of the Covenant in respect of her son have been sufficiently substantiated, for purposes of admissibility, and proceeds to their examination on the merits.

Consideration of the merits

8.1 The Human Rights Committee has considered this communication in the light of all the information received, in accordance with article 5, paragraph 1, of the Optional Protocol.

8.2 The Committee notes the author's claims under articles 7 and 14, paragraph 3 (g), of the Covenant that Mr. Zhuk was subjected to physical and psychological pressure with the purpose of eliciting a confession of guilt and that his confession served as a basis for his conviction. The Committee also notes that these allegations were not refuted by the State party. In this regard, the Committee recalls that, once a complaint about ill-treatment contrary to article 7 has been filed, a State party must investigate it promptly and impartially.[12] It further recalls that the safeguard laid down in article 14, paragraph 3 (g), of the Covenant must be understood in terms of the absence of any direct or indirect physical or undue psychological pressure from the investigating authorities on the accused, with a view to obtaining a confession of guilt.[13] The Committee notes that, despite the medical certificate evidencing injuries on the body of the author's son, which was submitted by the defence lawyers during the cassation proceedings, the State party has not presented any information to demonstrate that it had conducted any investigation into the ill-treatment allegations. In these circumstances, due weight must be given to the author's claims and the Committee concludes that the facts before it disclose a violation of Mr. Zhuk's rights under articles 7 and 14 (para. 3 (g)) of the Covenant.[14]

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[11] See, for example, communications No. 1812/2008, *Levinov v. Belarus*, Views adopted on 26 July 2011, para. 7.3, and No. 2120/2011, *Kovaleva and Kozyar v. Belarus*, para. 10.4.

[12] See the Committee's general comment No. 20 (1992) on the prohibition of torture or cruel, inhuman or degrading treatment or punishment, para. 14 (*Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40* (A/47/40), annex VI, sect. A).

[13] See, for example, the Committee's general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, para. 41 (*Official Records of the General Assembly, Sixty-second Session, Supplement No. 40*, vol. I (A/62/40 (Vol. I))); communications No. 330/1988, *Berry v. Jamaica*, Views adopted on 4 July 1994, para. 11.7; No. 1033/2001, *Singarasa v. Sri Lanka*, Views adopted on 21 July 2004, para. 7.4; No. 1769/2008, *Ismailov v. Uzbekistan*, Views adopted on 25 March 2011, para. 7.6.

[14] See, for example, the Committee's general comment No. 32, para. 60; communications No. 1401/2005, *Kirpo v. Tajikistan*, Views adopted on 27 October 2009, para. 6.3; No. 1545/2007, *Gunan v. Kyrgyzstan*, Views adopted on 25 July 2011, para. 6.2.

8.3 As to the author's claim that Mr. Zhuk was arrested on 1 March 2009, but was not brought before a judge for a review of his detention until 6 June 2009, three months and five days after his arrest, the Committee notes that the State party failed to address these allegations. While the meaning of the term "promptly" in article 9, paragraph 3, must be determined on a case-by-case basis, the Committee recalls its general comment No. 8 (1982) on the right to liberty and security of persons[15] and its jurisprudence,[16] pursuant to which delays should not exceed a few days. The Committee further recalls that it has recommended on numerous occasions, in the context of consideration of the States parties' reports submitted under article 40 of the Covenant, that the period of police custody before a detained person is brought before a judge should not exceed 48 hours.[17] Any longer period of delay would require special justification to be compatible with article 9, paragraph 3, of the Covenant.[18] The Committee therefore considers the delay of more than three months before bringing Mr. Zhuk before a judge to be incompatible with the requirement of promptness set forth in article 9, paragraph 3 of the Covenant and thus constitutes a violation of Mr. Zhuk's rights under this provision.

8.4 The Committee further notes the author's allegations that the principle of presumption of innocence was not respected, because several State officials made public statements about her son's guilt before his conviction by the court and because mass media made materials of the preliminary investigation available to the public at large before the consideration of his case by the court. Moreover, he was kept in a metal cage throughout the court proceedings and the photographs of him behind metal bars in the courtroom were published in the local media. The Committee also notes that these allegations were not refuted by the State party. In this respect, the Committee recalls its jurisprudence[19] as reflected in its general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, according to which "the presumption of innocence, which is fundamental to the protection of human rights, imposes on the prosecution the burden of proving the charge, guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt, ensures that the accused has the benefit of doubt, and requires that persons accused of a criminal act must be treated in accordance with this principle".[20] The same general comment refers to the duty of all public authorities to refrain from prejudging the outcome of a trial, including by abstaining from making public statements affirming the guilt of the accused;[21] it further states that defendants should normally not be shackled or kept in cages during trial or otherwise presented to the court in a manner indicating that they may be dangerous criminals and that the media should avoid news coverage undermining the presumption of innocence. On the basis of the information before it and in the absence of any response from the State party, the Committee considers that the presumption of innocence of Mr. Zhuk guaranteed under article 14, paragraph 2, of the Covenant has been violated.

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[15] *Official Records of the General Assembly, Thirty-seventh Session, Supplement No. 40* (A/37/40), annex V, para. 2.

[16] The Committee found that, in the absence of any explanations by the State party, a delay of three days in bringing a person before a judge did not meet the requirement of promptness within the meaning of article 9, paragraph 3 (see communication No. 852/1999, *Borisenko v. Hungary*, para. 7.4). See also communications No. 2120/2011, *Kovaleva and Kozyar v. Belarus*, para. 11.3, and No. 1787/2008, *Kovsh v. Belarus*, Views adopted on 27 March 2013, paras. 7.3–7.5.

[17] See, for example, concluding observations on Kuwait, CCPR/CO/69/KWT, para. 21; concluding observations on Zimbabwe, CCPR/C/79/Add.89, para. 17; concluding observations on El Salvador, CPR/C/SLV/CO/6, para. 14; concluding observations on Gabon, CCPR/CO/70/GAB, para. 13.

[18] See *Borisenko v. Hungary*, para. 7.4. See also Basic Principles on the Role of Lawyers, adopted at the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August–7 September 1990, principle 7.

[19] See, for example, communications No. 770/1997, *Gridin v. Russian Federation*, Views adopted on 20 July 2000, para. 8.3; No. 1520/2006, *Mwamba v. Zambia*, Views adopted on 10 March 2010, para. 6.5.

[20] See Committee's general comment No. 32, para. 30.

[21] Ibid., para. 30.

8.5 The Committee further notes the author's allegations that her son has only been allowed to see a lawyer for five minutes and has effectively been deprived of legal assistance during the initial phases of the investigative proceedings, and that he was forced to participate in investigative actions without legal advice, despite his requests for a lawyer, in violation of the domestic criminal proceedings. The Committee also notes that these allegations were not refuted by the State party. The Committee recalls that article 14, paragraph 3 (b), of the Covenant provides that accused persons must have adequate time and facilities for the preparation of their defence and to communicate with counsel of their own choosing. This provision is an important element of the guarantee of a fair trial and an application of the principle of equality of arms.[22] It further recalls that the right of all accused of a criminal charge to defend themselves in person or through legal counsel of their own choosing, or to have legal assistance assigned to them free of charge whenever the interests of justice so require, is provided for by article 14, paragraph 3 (d).[23] In the absence of any observations from the State party on the facts presented by the author, the Committee concludes that the denial of access to a lawyer of choice during the initial crucial stage of the pretrial proceedings constitutes a violation of Mr. Zhuk's rights under article 14, paragraph 3 (b) and (d), of the Covenant.

8.6 The Committee notes the author's allegation that her son's rights under article 14, paragraph 1, were violated. The Committee also notes that this allegation was not refuted by the State party. In the light of the Committee's findings that the State party failed to comply with the guarantees of a fair trial under article 14, paragraphs 2 and 3 (b), (d) and (g), of the Covenant, the Committee is of the view that Mr. Zhuk's trial suffered from irregularities which, taken as a whole, amount to a violation of article 14, paragraph 1, of the Covenant.

8.7 The author further claims a violation of Mr. Zhuk's right to life under article 6 of the Covenant, since he was sentenced to death after an unfair trial. The Committee notes that the State party has argued, with reference to article 6, paragraph 2, of the Covenant, that Mr. Zhuk was sentenced to death following the judgment handed down by the courts, in accordance with the Constitution, the Criminal Code and the Code of Criminal Procedure of Belarus, and that the imposed death penalty was not contrary to the international instruments to which Belarus is a State party. In this respect, the Committee recalls its general comment No. 6 (1982) on the right to life, where it noted that the provision that a sentence of death may be imposed only in accordance with the law and not contrary to the provisions of the Covenant, implies that "the procedural guarantees therein prescribed must be observed, including the right to a fair hearing by an independent tribunal, the presumption of innocence, the minimum guarantees for the defence, and the right to review by a higher tribunal".[24] In the same context, the Committee reiterates its jurisprudence that the imposition of a sentence of death upon conclusion of a trial in which the provisions of article 14 of the Covenant have not been respected constitutes a violation of article 6 of the

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[22] Ibid., para. 32.

[23] See also communication No. 1769/2008, *Ismailov v. Uzbekistan*, para. 7.4.

[24] *Official Records of the General Assembly, Thirty-seventh Session, Supplement No. 40* (A/37/40), annex V, para. 7; see also communication No. 253/1987, *Kelly v. Jamaica*, Views adopted on 8 April 1991, para. 5.14.

Covenant.[25] In the light of the Committee's findings of a violation of article 14, paragraphs 1, 2 and 3 (b) (d) and (g), of the Covenant, it concludes that the final sentence of death and the execution of Mr. Zhuk were passed without having met the requirements of article 14, and that as a result his right to life under article 6 of the Covenant has been violated.

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the Covenant, is of the view that the facts before it disclose a violation of Mr. Zhuk's rights under articles 6, 7, 9 (para. 3) and 14 (paras. 1, 2 and 3 (b), (d) and (g)) of the Covenant. The State party also breached its obligations under article 1 of the Optional Protocol to the Covenant.

10. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide adequate compensation to the author, including reimbursement of the legal costs incurred. The State party is also under the obligation to prevent similar violations in the future and, in the light of the State party's obligations under the Optional Protocol, to cooperate in good faith with the Committee particularly by complying with the Committee's requests for interim measures.

11. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in the case that a violation has been established, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. In addition, it requests the State party to publish the present Views, and to have them widely disseminated in Belarusian and Russian in the State party.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

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[25] See the Committee's general comment No. 32, para. 59; communications No. 719/1996, *Levy v. Jamaica*, Views adopted on 3 November 1998, para. 7.3; No. 1096/2002, *Kurbanov v. Tajikistan*, Views adopted on 6 November 2003, para. 7.7; No. 1044/2002, *Shukurova v. Tajikistan*, Views adopted on 17 March 2006, para. 8.6; No. 1276/2004, *Idieva v. Tajikistan*, Views adopted on 31 March 2009, para. 9.7; No. 1304/2004, *Khoroshenko v. Russian Federation*, Views adopted on 29 March 2011, para. 9.11; No. 1545/2007, *Gunan v. Kyrgyzstan*, Views adopted on 25 July 2011, para. 6.5.

BB. Communication No. 1919/2009, *Protsko v. Belarus* Communication No. 1920/2009, *Tolchin v. Belarus* (Views adopted on 1 November 2013, 109th session)*

Submitted by:	Alexander Protsko and Andrei Tolchin (not represented by counsel)
Alleged victims:	The authors
State party:	Belarus
Date of communication:	22 August 2009 (initial submissions)
Subject matter:	Freedom of expression; freedom of assembly
Procedural issue:	Exhaustion of domestic remedies
Substantive issues:	Unjustified restriction of the right to impart information
Articles of the Covenant:	19 and 21
Article of the Optional Protocol:	5 (para. 2 (b))

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 1 November 2013,

Having concluded its consideration of communications Nos. 1919-1920/2009, submitted to the Human Rights Committee by Alexander Protsko and Andrei Tolchin under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the authors of the communications and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The authors are Alexander Protsko, "the first author" (communication No. 1919/2009), and Andrei Tolchin, "the second author" (communication No. 1920/2009), both Belarusian nationals born in 1953 and 1959 respectively. They claim to be victims of a violation by Belarus of their rights under articles 19 and 21 of the International Covenant on Civil and Political Rights. They are unrepresented. The Optional Protocol entered into force for the State party on 30 September 1992.

1.2 On 1 November 2013, pursuant to rule 94, paragraph 2, of its rules of procedure, the Committee decided to combine the two communications for decision in the light of their factual and legal similarity.

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* The following members of the Committee participated in the examination of the present communication: Mr. Yadh Ben Achour, Mr. Lazhari Bouzid, Mr. Ahmad Amin Fathalla, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Walter Kälin, Ms. Zonke Zanele Majodina, Mr. Gerald L. Neuman, Sir Nigel Rodley, Mr. Victor Manuel Rodríguez-Rescia, Mr. Fabián Omar Salvioli, Ms. Anja Seibert-Fohr, Mr. Yuval Shany, Mr. Konstantine Vardzelashvili and Ms. Margo Waterval.

The facts as submitted by the authors

2.1 In April 2009, in two different locations in the Gomel Region, both authors were distributing information leaflets about forthcoming peaceful assemblies to commemorate individuals who had died in the Chernobyl accident in April 1986.

Mr. Protsko

2.2 On 22 April 2009 in the village of Bragin, the first author distributed leaflets about a forthcoming peaceful commemoration to be held in Bragin which would include the laying of wreaths and flowers at the memorial to Vassily Ignatenko, who had died during the Chernobyl accident.

2.3 The police arrested Mr. Protsko and filed an official report alleging that he had committed an administrative offence under article 23.34, part 1, of the Code of Administrative Offences (liability for breaches in the organization or holding of assemblies, meetings, street rallies, demonstrations, picketing and other events). The author points out that article 8 of the Law on Mass Events of 30 December 1997 prohibits the preparation and distribution of any kind of information materials regarding a planned event prior to obtaining official authorization for the event in question. Given that he was distributing leaflets about an unauthorized planned event, the police officers decided that he had breached the rules regarding the organization of a peaceful assembly. The case was brought to court immediately.

2.4 On the same day, the Braginsk District Court found him guilty of breaching article 23.34, part 1, of the Code of Administrative Offences and fined him 105,000 Belarusian roubles. The Court also ordered the confiscation of the 600 leaflets that had been seized.

2.5 On 20 May 2009, the Gomel Regional Court rejected the first author's appeal against the District Court decision. The first author further complained to the Supreme Court Chairperson, under the supervisory review proceedings, but his complaint was rejected on 4 August 2009 by a Deputy Chairperson of the Court. The author notes that he has exhausted all available domestic remedies without obtaining redress.

Mr. Tolchin

2.6 On 23 April 2009, in the city of Narovlya, the second author distributed leaflets about a planned peaceful assembly in Narovlya to lay wreaths and flowers at a memorial to those who had lost their lives in the Chernobyl accident. The police apprehended Mr. Tolchin and filed a report for a breach of article 23.34, part 1, of the Code of Administrative Offences, on the grounds that he had distributed leaflets for an unauthorized event. On this basis, on 24 April 2009, the Narovlyansk District Court ordered the author's administrative arrest for five days. The author appealed against this decision, but on 15 May 2009, the Gomel Regional Court rejected his appeal. The ruling of the court of first instance therefore became final and enforceable.

2.7 With regard to exhaustion of domestic remedies, and referring to the Committee's case law on the matter, the author contends that supervisory review proceedings in the State party do not constitute an effective remedy. In addition, in administrative cases supervisory review requires the payment of a State tax. The author's subsequent appeal to the Chairman of the Supreme Court under the supervisory review proceedings was returned to him without having been examined due to his non-payment of this tax.

The complaint

3.1 The authors claim that, in their cases, the application of the Law on Mass Events resulted in an unjustified restriction of their right to impart information about a peaceful commemoration, as protected under article 19, paragraph 2, of the Covenant and the right of peaceful assembly, as protected under article 21 of the Covenant.

3.2 Both authors claim that the courts did not explain why they were fined, apart from repeating that they had failed to comply with the statutory obligation to obtain authorization for a gathering prior to distributing leaflets about it. The appeal courts adopted their decisions without assessing the authors' acts in the light of the Covenant, despite the authors' specific request that they do so. The authors maintain that the restriction in question was not necessary for the purposes of article 19, paragraph 3, of the Covenant: for respect of the rights or reputations of others, the protection of national security or of public order (ordre public), or of public health or morals. Thus, according to the authors, they are victims of a violation of their rights under article 19, paragraph 2, and article 21 of the Covenant.

State party's observations on admissibility and on the merits

4.1 By two notes verbales of 25 January 2010, the State party provided its observations on the admissibility and the merits of the communications. It explains that, on 22 and 23 April 2009 respectively, the authors were found guilty of having distributed leaflets about commemorations without having obtained the requisite prior authorization from the authorities, thus violating the law. Both authors were apprehended by the police and were given official records for breaching the Code on Administrative Offences.

4.2 On 22 April 2009, the Braginsk District Court found Mr. Protsko guilty of a breach of article 23.34, paragraph 1, of the Code of Administrative Offences regulating the organization or holding of mass events and fined him 105,000 Belarusian roubles. On 20 May 2009, this decision was confirmed on appeal by the Gomel Regional Court. On 4 August 2009, Mr. Protsko's appeal under the supervisory review proceedings was rejected by a Deputy Chairperson of the Supreme Court.

4.3 On 24 April 2009, the Narovlyansk District Court found Mr. Tolchin guilty of a breach of article 23.34, paragraph 1, of the Code of Administrative Offences, and sentenced him to five days' administrative arrest. On 15 May 2009, this decision was confirmed on appeal by the Gomel Regional Court. On 14 July 2009, Mr. Tolchin's appeal under the supervisory review proceedings was returned to him by the Supreme Court due to his failure to pay the requisite State tax.

4.4 The State party adds that, under article 12.1 of the Code of Administrative Offences, rulings in administrative cases may be appealed by the person against whom the administrative case is opened. It notes that Mr. Protsko did not appeal to the Gomel Department of Internal Affairs or to the Ministry of Internal Affairs (as allowed under article 7.2 of the Procedural-Executive Code of Administrative Offences) against his apprehension by the Braginsk District Department of Internal Affairs or about the fact that the police had filed an administrative offence report on him. Similarly, Mr. Tolchin did not appeal to these institutions against his apprehension or the administrative offence report issued on him by the Narovlyansk District Department of Internal Affairs. Neither did the authors bring supervisory claims before the Prosecutor's Office. The State party also points out that Mr. Protsko has failed to submit a supervisory review complaint to the Chairperson of the Supreme Court, and that Mr. Tolchin has failed to appeal directly to the Chairperson of the Supreme Court under the supervisory review proceedings. Thus, according to the State party, the authors have not exhausted all available domestic remedies and there are no grounds to believe that these remedies would be unavailable or ineffective.

4.5 The State party adds that Mr. Tolchin's contention that supervisory review proceedings are ineffective is groundless. In substantiation, it provides statistical data indicating that in 2009, the Prosecutor's Office received 3,235 claims relating to administrative offences, of which 518 were acted upon. On the basis of protest motions by the General Prosecutor's Office, the Supreme Court quashed and modified 126 final rulings on administrative offences which had already been enforced. According to the State party, these data show that the prosecutor's supervisory review (*nadzor*) constitutes an effective remedy for judicial protection and that a large number of cases involving administrative offences are examined each year on the basis of prosecutor's protest motions. With respect to monetary losses which complainants suffer when bringing a supervisory claim, the State party notes that the compulsory payment of a State tax is provided by law and the law must be obeyed.

4.6 Regarding the claim that the Law on Mass Events is incompatible with the provisions of the Covenant, the State party argues that the aim of the law in question is not only to regulate the organization and holding of mass events, meetings, rallies, demonstrations, picketing and other events, but also to ensure the conditions for the realization of citizens' constitutional rights and freedoms, public safety and order in the streets, squares or other public venues where such events take place.[1]

4.7 The State party declares that, in the light of the above considerations, the authors' allegations that their administrative liability constituted a violation of their rights under articles 19 and 21 of the Covenant are unfounded.

Authors' comments on the State party's submission

5.1 By letters of 22 November 2010 (received in March 2013), the authors submitted their comments on the State party's observations. They maintain that they have exhausted all available domestic remedies as they have both submitted cassation appeals against the decisions of the courts of first instance. According to them, only cassation appeals are effective, as they always result in an assessment of the merits of a case. Supervisory review appeals are ineffective because they are left to the discretion of an official, and even if they take place, they do not result in a reconsideration of the facts and evidence of the case but are limited to issues of law only. The authors note that, according to the Committee, remedies should not only be accessible but also effective. The authors add that no individual complaint to the Constitutional Court is possible in Belarus.

5.2 Mr. Tolchin adds that he complained to the Chairperson of the Supreme Court under the supervisory review proceedings, but his complaint was not examined as he did not pay the State tax required for the review; he contends that he was unable to pay it at the time. Mr. Protsko notes that he also complained to the Chairperson of the Supreme Court under the supervisory review proceedings, but that his complaint was examined by a Deputy Chairperson of the Supreme Court who rejected his appeal.

5.3 Mr. Tolchin points out that the statistical data on supervisory review proceedings in administrative cases that the State party submitted do not indicate how many of those cases involved administrative prosecution of public or political activists on clearly political grounds. He expresses doubts that these figures relate to civil and political rights, and explains that he is unaware of the existence in the past 10 years of any instance in which the Supreme Court or the Prosecutor General's Office have sought the annulment of an administrative case related to the civil and political rights of Belarusian citizens.

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[1] The State party adds that article 9 of this Law lists the locations where mass events cannot take place. Local authorities are responsible for stipulating permanent sites for mass events and for indicating the sites on which no such events can take place, and making corresponding announcements through the mass media.

5.4 The authors consider that all the available domestic remedies for the purposes of article 5, paragraph 2 (b), of the Optional Protocol have been exhausted in their cases.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claim contained in a communication, the Human Rights Committee must decide, in accordance with rule 93 of its rules of procedure, whether the communication is admissible under the Optional Protocol to the Covenant.

6.2 As required by article 5, paragraph 2 (a), of the Optional Protocol, the Committee has ascertained that the same matter is not being examined under any other procedure of international investigation or settlement.

6.3 As to the issue of exhaustion of domestic remedies, the Committee takes note of the State party's argument that the authors failed to appeal against their apprehension and administrative prosecution before the Ministry of Internal Affairs; that they failed to request that the Prosecutor's Office initiate a supervisory review; that the first author failed to submit a supervisory review complaint to the Chairperson of the Supreme Court; and that the second author failed to submit his request for supervisory review by the Chairperson of the Supreme Court with the requisite State tax.

6.4 The Committee notes that the State party has not provided any explanation as to how a complaint to the Gomel Department of Internal Affairs or to the Ministry of Internal Affairs would constitute an effective remedy in the authors' cases, for the purposes of exhaustion of domestic remedies. Accordingly, the Committee considers that it is not precluded by article 5, paragraph 2 (b), of the Optional Protocol from examining the communications on this ground.

6.5 The Committee further notes the authors' claim that supervisory review proceedings are neither effective nor accessible. The Committee notes the State party's objections in this respect, particularly the statistics provided to demonstrate that supervisory review was effective in a number of instances involving administrative cases. However, the Committee notes that the State party has not indicated whether the supervisory review procedure has been successfully applied in cases concerning freedom of expression or the right to peaceful assembly and, if it has, in how many cases. The Committee recalls its jurisprudence, according to which the State party's supervisory review of court decisions that have been enforced does not constitute a remedy which has to be exhausted for the purposes of article 5, paragraph 2 (b), of the Optional Protocol.[2] In the light of this, the Committee considers that it is not precluded by the requirements of article 5, paragraph 2 (b), of the Optional Protocol from examining the present communications.

6.6 The Committee considers that the authors have sufficiently substantiated their claim of a violation of their rights under article 19, paragraph 2, and article 21 of the Covenant. Accordingly, it declares the communications admissible, and proceeds with its Consideration of the merits.

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[2] See, for example, communication No. 1808/2008, *Kovalenko v. Belarus*, Views adopted on 17 July 2013, para. 7.3; communication No. 1785/2008, *Oleshkevich v. Belarus*, Views adopted on 18 March 2013, para. 7.3; communication No. 1784/2008, *Schumilin v. Belarus*, Views adopted on 23 July 2012, para. 8.3.

Consideration of the merits

7.1 The Human Rights Committee has considered the present communications in the light of all the information made available to it by the parties, as required under article 5, paragraph 1, of the Optional Protocol.

7.2 The first issue before the Committee is whether the seizure of the leaflets and the fine imposed on the first author and the five days' administrative detention to which the second author was sentenced for distributing leaflets about two planned peaceful public events to commemorate those who had died in the Chernobyl accident constitute violations of the authors' rights under article 19, paragraph 2, of the Covenant.

7.3 The Committee recalls that article 19, paragraph 2, of the Covenant requires States parties to guarantee the right to freedom of expression, including the freedom to impart information. The Committee refers to its general comment No. 34 (2011) on freedoms of opinion and expression, according to which freedom of opinion and freedom of expression are indispensable conditions for the full development of the person. They are essential for any society and constitute the foundation stone for every free and democratic society.[3] Any restrictions on the exercise of these freedoms must conform to strict tests of necessity and proportionality.[4] Restrictions must be applied only for those purposes for which they were prescribed and must be directly related to the specific need on which they are predicated.[5]

7.4 The Committee notes that the seizure of the leaflets, the fine imposed on the first author and the detention of the second author constitute restrictions on the exercise of the right to impart information. Therefore it must consider whether the restrictions imposed on the authors' rights in the present communications are justified under the criteria set out in article 19, paragraph 3, of the Covenant.

7.5 The Committee recalls that article 19, paragraph 3, of the Covenant allows certain restrictions, but only as provided by law and necessary: (a) for respect of the rights or reputation of others; or (b) for the protection of national security or of public order (ordre public), or of public health or morals. The Committee notes that if the State imposes a restriction, it is for the State party to demonstrate that the restriction on the rights under article 19, paragraph 2, of the Covenant was necessary in the case in question, and that even if, in principle, States parties may introduce a system aimed at reconciling an individual's freedom to impart information and the general interest of maintaining public order in a certain area, the system must not operate in a way that is incompatible with the object and purpose of article 19 of the Covenant.[6]

7.6 The Committee notes the authors' claim that the authorities have failed to explain, for the purposes of article 19, paragraph 3, of the Covenant, why it was necessary to restrict their right to impart information about peaceful assemblies and subject them to administrative proceedings for respect of the rights or reputations of others or for the protection of national security or of public order (ordre public), or of public health or morals.

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[3] See the Committee's general comment No. 34 (2011) on freedoms of opinion and expression, para. 2, *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 40*, vol. I (A/66/40 (Vol. I)), annex V.

[4] Ibid., para. 22.

[5] Ibid., para. 22. See also, for example, communication No. 1948/2010, *Turchenyak et al. v. Belarus*, Views adopted on 24 July 2013, para. 7.7.

[6] See, for example, communication No. 1948/2010, *Turchenyak et al. v. Belarus*, Views adopted on 24 July 2013, para. 7.8.

7.7 The Committee notes the State party's explanation that both authors were subject to administrative prosecution because, by distributing leaflets, they breached the provisions of article 23.34, paragraph 1, of the Code of Administrative Offences regulating the organization or holding of mass events. The Committee notes that both authors were sanctioned for disseminating information about planned commemorations which had not been authorized by the local authorities, as required under the Law on Mass Events. The Committee notes that, under the Law on Mass Events, no information about a planned meeting must be disseminated before the meeting has been officially authorized by the competent local authorities, and that the failure to observe this regulation constitutes an administrative offence under the Law. In this connection, the Committee further notes the State party's explanation that the Law on Mass Events not only regulates the organization and holding of mass events, meetings, rallies, demonstrations, picketing and other events, but also seeks to provide the conditions for the realization of the constitutional rights and freedoms of citizens in order to ensure public safety and order in public venues where such events take place. However, the Committee notes that the State party has failed to demonstrate that the fines imposed on the first author and the detention of the second author, regardless of the fact that they were based on a law, were necessary for one of the legitimate purposes under article 19, paragraph 3, of the Covenant.

7.8 The Committee recalls that restrictions must not be overbroad and that the principle of proportionality has to be respected not only in the law that frames the restrictions but also by the administrative and judicial authorities in applying the law.[7] The Committee observed in its general comment No. 34 that, when a State party invokes a legitimate ground for restriction of freedom of expression, it must demonstrate in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat.[8] As the Gomel Regional Court failed to examine the issue of whether restricting the authors' right to impart information was necessary for the purposes of article 19, paragraph 3, of the Covenant, and in the absence of any other pertinent information on file to justify the authorities' decisions, the Committee considers that in the present case the State party has failed to demonstrate that the restrictions imposed on the authors' rights meet the criteria set out in article 19, paragraph 3, of the Covenant. The Committee therefore concludes that the authors are victims of a violation by the State party of their rights under article 19, paragraph 2, of the Covenant.

7.9 In the light of this conclusion, the Committee decides not to examine separately the authors' claims under article 21 of the Covenant.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the information before it discloses a violation by the State party of the authors' rights under article 19, paragraph 2, of the Covenant.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the authors with an effective remedy, in the form of the reimbursement of the current value of the fine and any legal costs incurred by the authors, as well as adequate compensation, including for the five days of arrest. The State party is also under an obligation to prevent similar violations in the future. To this end, it should

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[7] See the Committee's general comment No. 34 (2011), para. 34. See also communication No. 1128/2002, *Marques v. Angola*, Views adopted on 29 March 2005, para. 6.8 and communication No. 1157/2003, *Coleman v. Australia*, Views adopted on 17 July 2006, para. 7.3.

[8] See the Committee's general comment No. 34 (2011), para. 35.

review its legislation, particularly the Law on Mass Events, and its implementation, to ensure its compatibility with article 19 of the Covenant.

10. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether or not there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when a violation has been established, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views, and to have them widely disseminated in Belarusian and Russian in the State party.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

CC. Communication No. 1928/2010, *Singh v. France* (Views adopted on 19 July 2013, 108th session)[*]

Submitted by:	Shingara Mann Singh (represented by counsel, Ms. Christine Bustany of O'Melveny & Myers)
Alleged victim:	The author
State party:	France
Date of communication:	15 December 2008 (initial submission)
Subject matter:	Obligation to appear bareheaded on passport photographs
Procedural issue:	Failure to exhaust domestic remedies
Substantive issues:	Freedom to manifest one's religion, freedom of movement, indirect discrimination
Articles of the Covenant:	Articles 2, 12, 18 and 26
Article of the Optional Protocol:	Article 5 (para. 2 (b))

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 19 July 2013,

Having concluded its consideration of communication No. 1928/2010, submitted to the Human Rights Committee by Shingara Mann Singh under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Shingara Mann Singh, a French citizen originally from the Punjab region in India. He claims to be the victim of a violation by France of articles 2, 12, 18 and 26 of the International Covenant on Civil and Political Rights. The Optional Protocol entered into force for the State party on 17 May 1984. The author is represented by counsel.

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[*] The following members of the Committee participated in the consideration of the present communication: Mr. Yadh Ben Achour, Mr. Lazhari Bouzid, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Walter Kälin, Ms. Zonke Zanele Majodina, Mr. Kheshoe Parsad Matadeen, Mr. Gerald L. Neuman, Mr. Victor Manuel Rodríguez-Rescia, Mr. Fabián Omar Salvioli, Ms. Anja Seibert-Fohr, Mr. Yuval Shany, Mr. Konstantine Vardzelashvili and Ms. Margo Waterval.

Pursuant to rule 90 of the Committee's rules of procedure, Committee member Ms. Christine Chanet did not participate in the consideration of the present communication.

The facts as submitted by the author

2.1 The author emigrated to France in 1970 and was naturalized in 1989, when he became a French citizen and immediately obtained a French passport. For his first passport, the prefecture in Val d'Oise, his place of residence, allowed him to wear his turban on the identity photographs. In the following 15 years the author obtained three more passports, issued successively on 8 December 1989, 21 October 1991 and 15 December 1995, and an extension for the 1995 passport, issued on 16 November 2000. Each passport included a photograph showing the author with his turban.

2.2 On 8 December 2005 the author attempted to renew his passport for the fourth time and submitted a photograph showing him wearing his turban. However, Val d'Oise prefecture rejected his application, stating that the photograph was not in conformity with the provisions of Decree No. 2001-185 of 26 February 2001 on the conditions for the issuance and renewal of passports. Article 5 of the decree provides that identity photographs must be "face-on, bareheaded, in 35 x 45 mm format, recent, and with an accurate likeness". The decree in question has been replaced by Decree No. 2005-1726 of 30 December 2005 on electronic passports, but the requirements for photographs remain the same.

2.3 On 16 February 2006 the author challenged the Prefect's refusal before the Cergy-Pontoise Administrative Court, which rejected his application on 29 June 2006. The author then appealed the decision before the Versailles Administrative Court of Appeal, which rejected the application in a ruling handed down on 24 January 2008.

2.4 The ruling of the Versailles Administrative Court of Appeal refers to articles 9 and 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter "European Convention on Human Rights") and to article 18 of the Covenant and points out that those provisions "themselves stipulate that the freedoms they guarantee may be subject to limitations, in particular in the interest of public safety and the protection of public order; that the provisions of article 5 of the decree of 26 February 2001 [...], aimed at limiting the risk of fraud or falsification of driver's licences, by making it possible for the document in question to identify the document holder as veraciously as possible, are neither inappropriate nor disproportionate in relation to the objective at hand; that the fact that the use of photographs showing people with their heads covered has been tolerated in the past does not constitute an obstacle to the decision to end such tolerance owing to the increase in the number of falsifications detected; that the specific violation of the requirements and rituals of the Sikh religion invoked is not disproportionate to the objective in question, in particular taking into account the limited nature of the obligation to remove a head dress to produce a bareheaded photograph; that the requirement does not involve treatment that is different for Sikh persons than it would be for other applicants, and that consequently the contention that the decree of 26 February 2001 is illegal should be dismissed". The ruling also notes that the decision of the subprefect "involved no discrimination, nor did it disregard [...] the principle of equality as invoked in the provisions of article 19 of the Act of 30 December 2004 [establishing the High Authority to Combat Discrimination and Promote Equality], the provisions of articles 9 and 14 of the European Convention on Human Rights [...] and the provisions of articles 1 and 12 of the Covenant".

2.5 The author claims that he did not bring the case before the Conseil d'Etat because that body had on 15 December 2006 issued a ruling against him in an identical case which concerned the photograph on his driver's licence. The Conseil d'Etat had deemed that the purpose of the provisions at issue, in particular Circular No. 2005-80 of 6 December 2005 concerning identity photographs on driver's licences, was to limit the risk of fraud or falsification of driver's licences by making it possible for the document in question to identify the document holder as veraciously as possible, and that the violation of the requirements and rituals of the Sikh religion was not disproportionate to the objective in question, in particular taking into account the limited nature of the obligation to remove a head dress to produce a bareheaded photograph. It did not involve treatment that was different for Sikh persons than it would be for other applicants.

2.6 The author subsequently brought the case concerning his driver's licence before the European Court of Human Rights, which in a decision of 13 November 2008 declared the case inadmissible, as it was manifestly unfounded. Specifically, in relation to article 9 of the European Convention on Human Rights, the Court took into consideration the margin of discretion of States in this field and concluded that the impugned interference was justified in principle and proportionate to the objective in question.[1]

2.7 In the light of these two rulings, the author considered it futile to bring this case before the Conseil d'Etat and the European Court of Human Rights, as the arguments are the same. He thus considers that domestic remedies have been exhausted. Furthermore, the State party's violation of his freedom of religion in this case deprives him of the opportunity to travel outside his own country, which makes the need to find a solution all the more pressing.

2.8 The author maintains that wearing a turban is an integral part of a Sikh's faith and identity. The first commandment of the Sikh faith is that the hair must never be cut and must be kept clean, groomed and hidden from public view. Removal of the turban may be considered a renunciation of the faith, and the disrespectful mishandling by others of one's turban is extremely insulting. To oblige Sikhs to remove their turbans is as humiliating as obliging people to remove their trousers in public. A number of countries recognize the dual religious and personal significance of the turban and the importance of covering one's hair; they have adopted specific measures to protect the dignity and religious freedom of devout Sikhs.

The complaint

3.1 The author maintains that the application of article 5 of Decree No. 2001-185 in respect of his case violates articles 2, 12, 18 and 26 of the Covenant.

3.2 While the decree appears to be neutral, the requirement to show oneself bareheaded is humiliating for the minority of French citizens who are observant Sikhs. The application of this provision in the author's case is thus indirect discrimination based on his ethnic origin and religious beliefs. Identical treatment of persons in very different situations can constitute a form of discrimination. What is important is for people to have the opportunity to equally enjoy the same rights. This discriminatory effect violates articles 2 and 26 of the Covenant. In this respect, the Committee's general comment No. 18 states that the principle of equality sometimes requires that States take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant.[2] France must treat Sikhs differently from how it treats the majority when this is necessary to avoid a discriminatory effect.

3.3 The author maintains that he has been a victim of a violation of his right to manifest his religion or belief. The French authorities argue that the requirement for "proportionality" has been met, as the infringement of the author's freedom of religion is "temporary". However, a bareheaded photograph of the author is very likely to repeatedly lead to orders to remove the turban so as to make it possible to better compare his appearance with his likeness on the photograph. Such repeated humiliation is not proportionate to the objective of identifying the person. The Covenant does not authorize States to restrict the right to manifest one's religion when such restrictions would have the sole purpose of being useful, desirable or expedient or when they have an impact only on one religious or ethnic minority. Any restriction must be necessary; with no other solution available that would be proportionate to the objective in question.

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[1] *Mann Singh v. France* (dec.), No. 24479/07.

[2] General comment No. 18: Non-discrimination, Official Documents of the General Assembly, Forty-fifth session, Supplement No. 40 (A/45/40), vol. I, annex VI, sect. A, para. 10.

3.4 Immigration officials and computer systems are capable of identifying a passport holder even if the person's hair is covered – even more reliably in the case of Sikhs, who never appear in public without their hair covered and face clearly visible. Such is the case in the three identity photographs in the author's previous passports, in which he wore his turban.

3.5 The State party currently authorizes citizens of other countries to enter its territory using passports where they are not bareheaded. It is therefore difficult to fathom why restrictions imposed only on the freedom of religion of French citizens are necessary to make France safer.

3.6 The acts at issue also constitute a violation of the right to freedom of movement guaranteed under article 12 of the Covenant. The author is being forced to choose either to uphold his dignity or to be able to travel outside of France, but he cannot do both. According to general comment No. 27, any restriction on freedom of movement must be consistent with all the other rights recognized in the Covenant.[3] The author points out that when States impose security regulations such as those relating to passports, which have an impact on freedom of movement, they must ensure that the restrictions imposed do not violate the other provisions of the Covenant.

State party's observations on admissibility

4.1 On 26 April 2010 the State party submitted its observations on admissibility, stating that the communication is inadmissible because of a failure to exhaust domestic remedies.

4.2 The author did not consider it necessary to bring the case before the Conseil d'Etat, as that body had already dealt with the substance of the question at hand in its ruling of 15 December 2006 in the case of *Association United Sikhs and Mr. Mann Singh*, a case in which he was a complainant. However, the case in question related only to conditions for issuing a driver's licence, not to supporting documents for a passport renewal. Furthermore, in this case the Conseil d'Etat had issued its decision only in respect of alleged violations of articles 9 and 14 of the European Convention on Human Rights, not the provisions of the Covenant.

4.3 The decision to bring this case before the Committee and not the European Court of Human Rights, while the author also alleged violations of articles 9 and 14 of the European Convention on Human Rights before the domestic courts, is motivated by a desire to obtain a decision from the Committee differing from the one already adopted by the Court. Thus, the complainant considers either that the Court's case law is not applicable to the Committee because of the specific nature of the Covenant, or that the outcome of litigation relating to the conditions for issuing driver's licences is not applicable to a challenge relating to conditions for issuing passports. In such circumstances, he cannot at the same time maintain that the Conseil d'Etat, by ruling on the conditions for issuing driver's licences solely on the basis of the European Convention, could have issued a decision in substance on the question now before the Committee.

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[3] General comment No. 27: Freedom of movement, Official Documents of the General Assembly, Fifty-fifth session, Supplement No. 40 (A/55/40), vol. I, annex VI, sect. A, para. 11.

4.4 In any event, in its ruling of 15 December 2006 the Conseil d'Etat did not address freedom of movement at all, yet this issue is also raised by the author in the present communication.

Author's comments on the State party's observations on admissibility

5.1 On 3 January 2011 the author challenged the State party's observations on admissibility. With regard to the exhaustion of domestic remedies, the author reiterated that the Conseil d'Etat had already issued a ruling on that question, in the case decided on 15 December 2006. It was of no importance that in the domestic procedures for that case the author had invoked articles 9 and 14 of the European Convention on Human Rights, while before the Committee he was invoking the corresponding articles of the Covenant. It was also of no importance that in the former case the author had decided to go before the European Court of Human Rights, while in the latter he had decided to bring the case before the Committee. The Committee was not obliged to follow the case law of the European Court of Human Rights.

5.2 The case from 2006 is not the only one in which the Conseil d'Etat issued an opinion on this matter. In another case, decided on 14 April 2009, the Conseil d'Etat rejected an appeal lodged by another Sikh citizen against Decree No. 46-1574, which requires the use of bareheaded photographs on residence permits.[4] The Conseil d'Etat had considered the requirement not to be in contradiction with articles 9 and 14 of the European Convention.

5.3 In the light of these two rulings it would have been futile to bring this issue before the Conseil d'Etat. As for the State party's argument that the 2006 case did not raise the issue of freedom of movement, nothing suggests that the decision of the Conseil d'Etat would be different if it had to take a position on that question. On the other hand, the violation of the right to freedom of movement stems from the violation of the right to freedom of religion, and the two are intricately linked. If it is futile to raise the issue of freedom of religion before the Conseil d'Etat, it is also futile to raise the issue of freedom of movement.

5.4 The author notes that this case is not the same as the one he brought before the European Court of Human Rights in 2006, as the domestic law at issue was different in 2006. The argument based on the Court's inadmissibility ruling is inoperative in the present case. Consequently, the current communication cannot be declared inadmissible under article 5, paragraph 2 (a), of the Optional Protocol.

State party's observations on the merits

6.1 On 20 August 2010 the State party submitted its observations on the merits of the communication. It points out that the principles of equality and non-discrimination are protected by the Constitution of 1958. As early as 1979 the freedom to come and go was recognized by the Constitutional Council as a constitutional principle.

Complaint relating to article 18

6.2 The State party recalls that the freedom to manifest one's religion is subject to the restrictions in article 18, paragraph 3, of the Covenant and that, in accordance with the

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[4] The *Ranjit Singh* case, which was later brought before the Committee. See communication No. 1876/2009, *Singh v. France*, Views adopted on 22 July 2011.

Committee's general comment No. 22 concerning article 18,[5] recourse to such restrictions must be interpreted in a strict sense.

6.3 The European Court of Human Rights has taken positions in cases where the freedom to wear religious clothing or attire has been restricted in order to protect public order or health or to protect the rights and freedoms of others. What is more, in a case very similar to the present one brought by the author before the European Court of Human Rights in 2007, the Court, applying its case law and without even communicating it to the State, deemed that the case was "manifestly unfounded".

6.4 The Court accepted that a bareheaded identity photograph was required on the driver's licence for the authorities in charge of ensuring public safety and the protection of public order, in particular for identity checks carried out to identify drivers and ensure that they were entitled to drive the vehicle in question. Such checks were necessary for public safety in the sense of article 9, paragraph 2, of the European Convention on Human Rights. The Court stressed, in this regard, that the impugned regulation had been tightened up because of the increased risk of fraud or falsification of driver's licences. It specified that the means for implementing such checks was within the discretion of the State, all the more so as the obligation to remove the turban for this purpose, or initially to issue a driver's licence, was a temporary measure. The Court thus concluded that "the impugned interference was justified in principle and proportionate to the objective in question".

6.5 The State party considers that the conditions established in article 18, paragraph 3, of the Covenant have been met. First of all, there is a legal provision for the measure being challenged: the decree of 26 February 2001.

6.6 Secondly, the measure has a legitimate objective. It addresses the need to limit the risk of passport fraud or falsification by making it possible to use the document in question to identify as veraciously as possible the document holder. This concern is all the more understandable for passports, as such documents, which allow their holders to pass borders, are subject to stringent security requirements, in particular in order to ensure public safety. By applying a simple rule setting out this obligation, the regulations allow the administrative authorities to avoid having to engage in troublesome assessments of whether one or another type of head covering, offering more or less facial coverage, allows for reliable identification of the person in question. It thus ensures public safety and order, and also the equality of all citizens before the law.

6.7 Thirdly, the measure at issue is proportionate to the objective. While the obligation to produce bareheaded identity photographs may represent a constraint or even be an embarrassment for some, the constraint is a limited one. People who consider themselves duty-bound to wear turbans are not obliged definitively or even repeatedly to refrain from doing so, but to do so just once, for the short time required to take a photograph. The nuisance for the applicant must be balanced against the general interest of combating passport falsification.

6.8 The author is hoping to obtain satisfaction from the Committee in respect of his passport while he did not obtain the same satisfaction from the European Court of Human Rights in respect of his driver's licence. In the light of the similarity of wording between article 9 of the European Convention on Human Rights and article 18 of the Covenant, the very strong similarity between the cases and the high level of protection of human rights afforded by both the Court and the Committee, the State party considers that the author's request lacks the relevant justification.

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[5] General comment No. 22 (1993), Official Documents of the General Assembly, Forty-eighth session, Supplement No. 40 (A/48/40), annex VI.

Complaint relating to articles 2 and 26

6.9 The author has not been subjected to any discrimination, as the decree of 26 February 2001 applies to everyone without distinction. Nor has he been the victim of any kind of indirect discrimination. The regulations in question have no discriminatory purpose and are not applied in a discriminatory manner. Paragraph 8 of general comment No. 18 states that "[t]he enjoyment of rights and freedoms on an equal footing, however, does not mean identical treatment in every instance". That paragraph does not mean that States are obliged to introduce differences in treatment according to the opinions of the different parties; it merely accepts in certain cases that separate rules can exist in cases where, objectively, situations of individuals differ. In the present case it is unjustified to grant certain people, on the basis of their religious beliefs, a dispensation from the rules applicable to all citizens for the purpose of maintaining public safety and order.

6.10 Similarly, the author cannot avail himself of paragraph 10 of general comment No. 18 to justify the derogation which he is claiming, as it states that "the principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant". This paragraph, which covers deliberate policies aimed at reducing de facto discrimination and refers cautiously to "affirmative action", in no way calls for the adoption of distinct laws that would apply to some people but not to others on the basis of their opinions or beliefs. Nor does it call for the State, in implementing the ordinary law, to engage in dubious (and, incidentally, discriminatory) arguments based on its understanding of the intensity of the philosophical or religious obligations of different people under its jurisdiction.

Complaint relating to article 12

6.11 This complaint raises no questions not already raised by the previous two complaints. The restrictions on the freedom to come and go which can result from the refusal to issue a travel document to the author result exclusively from his refusal to comply with the general rules for the issuance of passports, which are justified by the overriding need for public safety. In such conditions, it is not possible that a violation of article 12 of the Covenant has occurred.

Author's comments on the State party's observations on the merits

7.1 The author replied to the State party's observations on the merits on 3 January 2011.

Complaint relating to article 18

7.2 The author does not contest the fact that reducing fraud and falsification is a valid objective for the State to pursue. However, the State party does not prove that the measure at issue is required for it to attain that objective.

7.3 The State party provides no answers to the following arguments: (a) the obligation to use bareheaded photographs on passports is arbitrary, as it can apply to a large number of situations in which head covering is not an obstacle to identification; (b) turbans do not cover facial features. In the long term, turbans pose even fewer identification problems than other changes, such as those that take place when people radically grow out or cut their hair or beards, or when they dye their hair, wear wigs or hairpieces, or lose their hair or wear heavy make-up. In the author's case, as he always wears his turban in public, a photograph with a turban would facilitate identification rather than hamper it. In all his identity documents issued since 1970 he appears wearing a turban, and this never posed a problem; (c) the State party authorizes foreign citizens whose passport photographs do not show them bareheaded to enter its territory; (d) the State party authorizes the use for visa applications of photographs in which religious symbols that the person normally wears appear; (c) most European countries and others such as Australia, Canada, New Zealand and the United States of America, which have the same concerns as France regarding security and fraud, allow religious symbols to be worn on the head in identity photographs. France is the only country of the European Union that requires passport photographs to be bareheaded.

7.4 The lack of a response in the State party's observations to the above arguments demonstrates that the measure at issue is neither necessary nor legitimate under article 18, paragraph 3.

7.5 According to the author, it is not credible to suggest that the administrative authorities encounter problems in determining whether a head covering hides the face and to suggest that the measure thus ensures the principle of equality before the law. Many States have established rules in this respect. In the United States, for instance, head coverings may be worn in visa or passport photographs for religious reasons, but they must not cast a shadow on the face, and the forehead must not be covered. Furthermore, the State party does not respond to the author's suggestion regarding the use of alternative steps to prevent fraud, such as biometric measures or digital recognition.

7.6 As for the proportionality of the measure, the State party maintains that it is temporary, but a bareheaded photograph of the author would continuously be used as a means of official identification. The constraint would thus not be a mere inconvenience but an affront to the Sikh religion, to his ethnic identity and to his place in French society. A bareheaded photograph would result in multiple situations in which he would be requested to remove his turban to make it possible to check his likeness against the photograph.

7.7 On the above basis, the author concludes that there has been a violation of article 18, as the measure at issue is neither necessary nor proportionate and the State party has not made use of the least restrictive means to achieve the objectives it invokes.

Complaint relating to articles 2 and 26

7.8 The author reiterates that the measure at issue is an affront to the minority of French citizens who are Sikhs and to other non-Christian religious groups. Christians, the majority religious group in France, are not concerned by the measure, as they do not cover their heads for religious purposes. Consequently, it is clear that the application of the measure to the author is an act of indirect discrimination. Even if the measure at issue does not in itself have a discriminatory purpose and is not applied in a clearly discriminatory manner, it nonetheless produces a discriminatory effect.

7.9 The right to equality means that similar situations must be dealt with in the same way, and that, when necessary, different situations must be handled in different ways. The arguments in respect of article 18 concerning the need for and the proportionality of the measure are also valid for the complaints under articles 2 and 26.

Complaint relating to article 12

7.10 The author rejects the arguments of the State party on this subject, as they do not show that the restrictions to freedom of movement imposed on the author are justified. The criteria of necessity and proportionality to which reference is made are also valid in respect of the complaint relating to article 12.

Issues and proceedings before the Committee

Consideration of admissibility

8.1 Before considering any claim contained in a communication, the Human Rights Committee must decide, in accordance with rule 93 of its rules of procedure, whether the communication is admissible under the Optional Protocol to the Covenant.

8.2 As required under article 5, paragraph 2 (a), of the Optional Protocol, the Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement.

8.3 The Committee notes the arguments of the State party, which maintains that the author has not exhausted domestic remedies because he did not bring the case before the Conseil d'Etat after his application was rejected by the Versailles Administrative Court of Appeal. The Committee notes that in 2006 the Conseil d'Etat had ruled against the author in an appeal submitted by him against Circular No. 2005-80 of 6 December 2005 on the use of identity photographs on driver's licences. In another case brought by a Sikh citizen, the Conseil d'Etat had also upheld Decree No. 46-1574, which requires the use of bareheaded photographs on residence permits. In the light of these precedents of the Conseil d'Etat in relation to identity photographs, and the relevant legislation in force in France at the time, the Committee considers that article 5, paragraph 2 (b), of the Optional Protocol is not an obstacle to the admissibility of the communication in respect of the complaints relating to articles 2, 26 and 18, the main elements of which have already been the subject of decisions by the Versailles Administrative Court of Appeal.

8.4 With regard to the complaint of a violation of article 12 of the Covenant, the Committee observes that the author did not contest the argument of the State party that the question relating to the violation of freedom of movement had not previously been raised before the Conseil d'Etat. Consequently, the Committee considers that domestic remedies have not been exhausted with respect to the alleged violation of article 12 of the Covenant and finds this part of the communication to be inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

8.5 The Committee considers that all the other criteria for admissibility have been met and declares the communication admissible with respect to the complaints relating to articles 2, 18 and 26 of the Covenant.

Consideration of the merits

9.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as required under article 5, paragraph 1, of the Optional Protocol.

9.2 The Committee notes the author's allegation that the requirement to appear bareheaded on his passport's identity photograph is a violation of his right to freedom of religion under article 18 of the Covenant and is neither necessary nor proportionate when considered in the light of paragraph 3 of that article. The Committee notes that the State party considers that the conditions established in article 18, paragraph 3, have been met in this case. Specifically, it is claimed that the requirement responds to the need to limit the risk of fraud or falsification of passports and facilitates the identification of the passport holder by the administrative authorities, while the constraints involved are only temporary.

9.3 The Committee refers to its general comment No. 22 concerning article 18 of the Covenant and considers that the freedom to manifest a religion encompasses the wearing of distinctive clothing or head coverings.[6] The fact that the Sikh religion requires its members to wear a turban when in public is not contested. The wearing of a turban is not only regarded as a religious duty, but is also tied in with a person's identity. The Committee therefore considers that the author's use of a turban is a religiously motivated act and that article 5 of Decree No. 2001-185 and its equivalent in Decree No. 2005-1726, which require bareheaded passport photographs, interfere with the exercise of the right to freedom of religion. The Committee must therefore determine whether the restriction of the author's freedom to manifest his religion or belief (art. 18, para. 1) is authorized by article 18, paragraph 3, of the Covenant.

9.4 There is no dispute as to the fact that the law requires people to appear bareheaded in their identity photographs and that the purpose of this requirement is to protect public safety and public order. The task before the Committee therefore is to decide whether that limitation is necessary and proportionate to the end that is sought.[7] The Committee recognizes the State party's need to ensure and verify, for the purposes of public safety and public order, that the person appearing in the photograph on a passport is in fact the rightful holder of that document. The Committee observes, however, that the State party has not explained why the wearing of a Sikh turban covering the top of the head and a portion of the forehead, but leaving the rest of the face clearly visible, would make it more difficult to identify the author, who wears his turban at all times, than if he were to appear bareheaded. Nor has the State party explained in specific terms how bareheaded identity photographs of people who always appear in public with their heads covered help to facilitate their identification in everyday life and to avert the risk of fraud or falsification of passports.

9.5 Consequently, the Committee is of the view that the State party has not demonstrated that the limitation placed on the author is necessary within the meaning of article 18, paragraph 3, of the Covenant. It also observes that, even if the obligation to remove the turban for the identity photograph might be described as a one-time requirement, it would potentially interfere with the author's freedom of religion on a continuing basis because he would always appear without his religious head covering in the identity photograph and could thus be compelled to remove his turban during identity checks. The Committee therefore concludes that the regulation requiring persons to appear bareheaded in their passport photographs is a disproportionate limitation that infringes the author's freedom of religion and constitutes a violation of article 18 of the Covenant.

9.6 Having found that a violation of article 18 of the Covenant has occurred, the Committee will not consider the complaint stemming from the claim of a separate violation of the right to non-discrimination under articles 2 and 26 of the Covenant.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the information before it discloses a violation by the State party of article 18 of the Covenant.

11. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including a reconsideration of his application for renewal of his passport and the revision of the relevant rules and their application in practice, in the light of its obligations under the Covenant. The State party is also under an obligation to take steps to prevent similar violations in the future.

12. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether or not there has

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[6] Ibid., para. 4.

[7] Ibid., para. 8.

been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when a violation has been established, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views.

[Adopted in English, French and Spanish, the French text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

DD. Communication No. 1948/2010, *Turchenyak et al. v. Belarus* (Views adopted on 24 July 2013, 108th session)*

Submitted by:	Denis Turchenyak et al. (represented by counsel, Roman Kisliak)
Alleged victims:	The authors
State party:	Belarus
Date of communication:	21 November 2009 (initial submission)
Subject matter:	Unfair trial; freedom of expression; peaceful assembly; discrimination
Procedural issue:	Exhaustion of domestic remedies; level of substantiation of claim
Substantive issues:	Unfair trial; freedom of expression; right to peaceful assembly; discrimination
Articles of the Covenant:	14, paragraph 1; 19, paragraph 2; 21 and 26
Article of the Optional Protocol:	2; 5, paragraph 2 (a) and (b)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 24 July 2013,

Having concluded its consideration of communication No. 1948/2010, submitted to the Human Rights Committee by Mr. Denis Turchenyak et al., under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the authors of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The authors of the communication are Denis Turchenyak, born in 1974, Irina Lavrovskaya, born in 1951, Valery Fominsky, born in 1963, and Roman Kisliak,[1] born in 1975, all Belarusian nationals. They claim to be victims of violations by Belarus of their rights under article 14, paragraph 1; article 19, paragraph 2; article 21 and article 26 of the International Covenant on Civil and Political Rights. The Optional Protocol entered into force for the State party on 30 December 1992.

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* The following members of the Committee participated in the examination of the present communication: Mr. Yadh Ben Achour, Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Walter Kälin, Ms. Zonke Zanele Majodina, Mr. Kheshoe Parsad Matadeen, Mr. Gerald L. Neuman, Sir Nigel Rodley, Mr. Victor Manuel Rodriguez Rescia, Mr. Fabián Omar Salvioli, Ms. Anja Seibert-Fohr, Mr. Yuval Shany, Mr. Konstantine Vardzelashvili and Ms. Margo Waterval.

[1] Mr. Kisliak is submitting the communication on his own behalf, and is also acting as counsel for the other three authors.

The facts as submitted by the authors

2.1 On 30 December 2008, the authors filed an application with Brest City Executive Committee requesting to hold, on three consecutive days (15, 16 and 17 January 2009), pickets with the purpose of drawing citizens' attention to the problems that occurred in the course of the preparation of a monument devoted to the 1,000th anniversary of Brest. In the application, they specified that the pickets would be conducted by 10 people, including themselves, from 1 p.m. to 3 p.m., and that the intended location was a pedestrian zone on Gogol Street in Brest.

2.2 The application was reviewed by the Deputy Chair of Brest City Executive Committee, who, on 9 January 2009, issued a decision refusing to allow the conduct of pickets at the stated location. The refusal was based on Brest City Executive Committee's by-law decision No. 1715 of 25 October 2006 ("As regards the determination of a permanent location for the conduct of public gatherings in Brest"), which determines that public gatherings can only be organized in the "Lokomotiv" stadium, in compliance with the provisions of the 1997 Law "On public events in the Republic of Belarus".

2.3 On 10 February 2009, the authors appealed the refusal to Brest Region Executive Committee. On 20 February 2009, they received a reply from the Deputy Chair of Brest Region Executive Committee, rejecting their appeal as being unfounded.

2.4 Also on 10 February 2009, the authors appealed against the refusal of Brest City Executive Committee to the Court of Lenin District of Brest, claiming a violation of their freedom of expression. On 3 March 2009, they supplemented their appeal, claiming that the refusal constituted discrimination against them based on their beliefs. On 4 March 2009, the court rejected their appeal, stating that according to Brest City Executive Committee's Decision No. 1715 of 25 October 2006, with the exception of demonstrations and street processes organized by State authorities, the area designated for holding mass events was the "Lokomotiv" stadium. It considered the decision of Brest City Executive Committee of 9 January 2009 lawful and that it did not violate the authors' rights. The court found the author's claim of discrimination on the grounds of beliefs unjustified, as decisions regarding the location for holding mass events organized by State authorities are approved by Brest City Executive Committee on a case-by-case basis. During the trial, one of the authors requested the court to call in the Chair, the Deputy Chair and another employee of Brest City Executive Committee for questioning in court. The request was dismissed as the court considered that Brest City Executive Committee was already sufficiently and adequately represented before the court.

2.5 On 16 March 2009, the authors filed a cassation appeal with the Brest Regional Court against Lenin District Court of Brest. In the appeal, they maintained that their right to a fair trial was violated by the lower court, as it refused to summon the witnesses requested for questioning. On 9 April 2009, Brest Regional Court rejected the appeal, upholding the lower court's decision.

The complaint

3.1 The authors claim that their right to freedom of expression and the right to peaceful assembly as guaranteed under article 19, paragraph 2, and article 21 of the Covenant have been restricted arbitrarily, since neither the decision of the Deputy Chair of Brest City Executive Committee, nor the decisions of the domestic courts provided any justification as to the reasons for the restriction to hold the pickets, other than the formal application of Decision No. 1715 of 25 October 2006. In particular, the authors claim that the restriction in question was neither justified by reasons of national security nor public safety, public order, the protection of public health or morals, nor was it necessary for the protection of the rights and freedoms of others, and it therefore breaches article 19, paragraph 2, of the

Covenant. They allege that restricting all 300,000 citizens of Brest to conduct mass events to a single location, which, furthermore, is a stadium outside of the city centre and surrounded by a concrete wall, moves all mass events outside the public space, and thus infringes on freedom of expression.

3.2 The authors also claim that the refusal to allow them to conduct pickets outside of the sole location specified in Decision No 1715, amounted to discrimination based on their beliefs, in violation of article 26 of the Covenant, since Brest City Executive Committee had, on numerous occasions, allowed other persons to conduct mass events outside the officially assigned location. In substantiation, they refer to six different instances when the Executive Committee have allowed the holding of such mass events[2].

3.3 The authors further claim that their right to a fair trial, as guaranteed by article 14, paragraph 1, of the Covenant, was violated, as Lenin District Court of Brest refused to summon three key witnesses who the authors wanted to question. They also maintain that the court's refusal to summon those witnesses indicates that the judge had already sided with the position of the city authorities, and was therefore not impartial in deciding the case.

State party's preliminary observations

4.1 On 8 July 2010, the State party submitted, inter alia, that it "[…] does not find legal grounds for further consideration of these communications". It added that it did not appear from the documentation on file that the Committee had received these communications from individuals, as "it seems obvious" that the communications were prepared by a third party (not individuals), contrary to article 1 of the Optional Protocol to the Covenant. It further requested the Committee to clarify the relationship between the authors of the present communication and the persons indicated by them as contact persons eligible to obtain the confidential information from the Committee on the complaints, as well as to specify which articles of the Optional Protocol to the Covenant regulate the issue of submission by the Committee of the confidential information directly to the individuals and to the third party.

4.2 By note verbale of 10 August 2010, the Committee informed the State party that, inter alia, its Special Rapporteur on New Communications and Interim Measures sees no obstacles to the admissibility of the present communication under article 1 of the Optional Protocol, as it was duly signed by the respective authors and there is nothing in the Optional Protocol to the Covenant, the Committee's rules of procedure or working methods to prevent the authors from indicating an address other than their own for correspondence, if they wished to do so. It further invited the State party to submit its observations on the admissibility and merits of the communication within the established time limits.

4.3 By note verbale of 3 September 2010, the State party notes, inter alia, that "the Belarusian side suspends further consideration of the aforementioned communication(s) till the Committee provides comprehensive response on all issues raised by the State party in its previous submissions. It further notes that it has assumed its obligations under article 1 of the Optional Protocol." The State party took note of the reply of the Special Rapporteur on New Communications and Interim Measures on the absence of any obstacles to the admissibility of the communication under the Optional Protocol, but it considers the reply to be the Special Rapporteur's personal view, which does not and cannot create any legal obligations for the State parties to the Covenant. The State party further notes that it did not raise any issues concerning the addresses for correspondence relating to, inter alia, the present communication; however, "there were requests to the Committee to clarify the relationship of third parties to the complaint(s) of Mr. Turchenyak (…) and the grounds for the third parties, the persons who are not subject to Belarusian jurisdiction, being listed in the communications as contact persons eligible to obtain confidential information from the Committee". Finally, the State party "draws the Committee's attention to the fact that in accordance with article 1 of the Optional Protocol, the State party had recognized the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by the State party of any of the rights set forth in the Covenant, but not from other persons (third parties). The State party did not accept any other obligation under article 1 of the Optional Protocol and therefore it suspends further consideration of, inter alia, the present communication.

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[2] The six events in question were all organized by the State authorities.

4.4 By letter of 28 October 2010, the Chairperson of the Committee informed the State party that inter alia, the present communication was duly signed by the respective authors, who are themselves the alleged victims. Regarding the authors' decision to designate third parties residing outside of the State party to receive correspondence from the Committee on their behalf, the Chairperson noted that nothing in the Optional Protocol prevents authors from indicating an address other than their own for correspondence or from designating third parties as recipients of the Committee's correspondence on their behalf. In this regard, the Chairperson highlighted that it has been the Committee's longstanding practice that authors may designate representatives of their choice who may not necessary live in the territory of the State party, not only to receive correspondence, but even to represent them before the Committee. Finally, the State party was again invited to submit its observations on admissibility and merits. On 20 December 2010, a first reminder for observations was sent to the State party.

4.5 By note verbale of 6 January 2011, the State party recalled that it has repeatedly expressed its legitimate concerns to the Committee regarding unjustified registration of individual communications. The majority of their concerns relate to the communications which were submitted by individuals who had deliberately not exhausted all available remedies in the State party, including filing an , inter alia, by appeal with the Prosecutor's Office under the supervisory review procedure against judgements having acquired the force of res judicata.[3]

4.6 The State party further notes that the registration before the Committee of communications submitted by a third party (lawyers, other persons) on behalf of individuals alleging violations of their rights is undoubtedly abuse of the Committee's mandate, as well as of the right to submit of communications; registration of such communications is in violation of article 3 of the Optional Protocol. In addition, while being a State party to the Optional Protocol to the Covenant and having recognized the Committee's competence under article 1 thereof, the State party has not consented to the extension of the Committee's mandate. In this regard, the State party notes the Committee's "one-sided and broad interpretation […] of the legal norms of the respective international treaties" and explains that the interpretation of the provisions of the Covenant and the Optional Protocol shall be done strictly in accordance with articles 31, 32 and 33 of the Vienna Convention on the Law of the Treaties. It adds that according to the correct interpretation of article 1 and the preamble of the Optional Protocol to the Covenant, only communications submitted by individuals (and not by their representatives) may be registered by the Committee. Consequently, the State party concludes that it will decline every communication registered before the Committee in violation of the provisions of the aforementioned treaties and that any decision adopted by the Committee in relation to such communications will be considered by the State party as legally invalid.

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[3] The State party explains that the basis for this requirement is article 2 of the Optional Protocol to the Covenant.

4.7 On 20 September 2011, a second reminder was sent to the State party with a request to submit its observations on the admissibility and merits of the present case.

4.8 By note verbale of 5 October 2011, the State party submitted that there were no legal grounds for the consideration of the present communication, either on admissibility or merits, as it was registered in violation of article 1 of the Optional Protocol to the Covenant, regardless of the fact that third parties, not subject to the State party's jurisdiction, were involved in the present communication. It reiterates that the registration of communications submitted by a third party (lawyers, other persons) on behalf of individuals claiming a violation of their rights constitutes an abuse of the Committee's mandate and of the right to submit a communication, in violation of article 3 of the Optional Protocol to the Covenant.

4.9 On 25 October 2011, a third and final reminder was sent to the State party with a request to submit its observations on the admissibility and merits of the present case.

4.10 By note verbale of 25 January 2012, the State party reiterated its previous observations and those of 6 January 2011 in particular. It recalled that by adhering to the Optional Protocol it recognizes the Committee's competence under article 1 thereof to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of violation by the State party of any of the rights set forth in the Covenant. Such recognition of competence also extends to other provisions of the Optional Protocol to the Covenant, including those setting up criteria regarding petitioners and admissibility, in particular article 2 and article 5, paragraph 2, of the Optional Protocol. States parties have no obligation under the Optional Protocol to recognize the Committee's rules of procedure nor its interpretation of the provisions of the Optional Protocol. According to the State party, this means that in the context of the complaint procedure, States parties should be guided first and foremost by the provisions of the Optional Protocol and that reference to the Committee's long-standing practice, methods of work and jurisprudence "are not subjects of the Optional Protocol". It further submits that any communication registered in violation of the provisions of the Optional Protocol to the Covenant will be viewed by the State party as incompatible with the Optional Protocol and will be rejected without comments on admissibility or merits. The State party further maintains that decisions taken by the Committee on such "declined communications" will be considered by its authorities as "invalid".

Issues and proceedings before the Committee

The State party's failure to cooperate

5.1 The Committee notes the State party's assertion that there are no legal grounds for the consideration of the authors' communication, insofar as it is registered in violation of the provisions of the Optional Protocol; that it has no obligations regarding recognition of the Committee's rules of procedure nor the Committee's interpretation of the provisions of the Optional Protocol; and that decisions taken by the Committee on the present communication will be considered by its authorities as "invalid". The Committee also notes the State party's observation that registration of communications submitted by a third party (lawyers, other persons) on behalf of individuals claiming a violation of their rights constitutes an abuse of the mandate of the Committee and of the right to submit a communication.

5.2 The Committee recalls that article 39, paragraph 2, of the Covenant empowers it to establish its own rules of procedure, which the States parties have agreed to recognize. The Committee further observes that, by adhering to the Optional Protocol, a State party to the Covenant recognizes the competence of the Human Rights Committee to receive and consider communications from individuals claiming to be victims of violations of any of the rights set forth in the Covenant (preamble and art. 1). The Committee further notes that by denying the right of an individual to be represented by a lawyer (or a designated person) of his/her choice before the Committee, the State party fails to meet its obligations under the Optional Protocol to the Covenant. Implicit in a State's adherence to the Protocol is an undertaking to cooperate with the Committee in good faith so as to permit and enable it to consider such communications, and after examination, to forward its views to the State party and to the individual (art. 5, paras. 1 and 4). It is incompatible with these obligations for a State party to take any action that would prevent or frustrate the Committee in its consideration and examination of a communication and in the expression of its Views.[4] It is for the Committee to determine whether a communication should be registered. The Committee observes that, by failing to accept the competence of the Committee to determine whether a communication shall be registered and by declaring beforehand that it will not accept the determination of the Committee on the admissibility and on the merits of the communications, the State party violates its obligations under article 1 of the Optional Protocol to the Covenant.[5]

Consideration of admissibility

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

6.2 As required under article 5, paragraph 2 (a), of the Optional Protocol, the Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement.

6.3 With regard to the requirement set out in article 5, paragraph 2 (b), of the Optional Protocol, in the context of the authors' claims under articles 19, paragraph 2 and 21 of the Covenant, the Committee notes that in its submission of 6 January 2011 (see para. 4.5 above), the State party challenged the admissibility of the present communication on the ground of non-exhaustion of domestic remedies, as the authors had not filed a request for supervisory review with the Prosecutor's Office. However, the Committee notes that the State party did not indicated whether the procedure has been successfully applied in cases concerning freedom of expression and the right to peaceful assembly, nor did it specify the number of such cases, if any. The Committee recalls its jurisprudence according to which this kind of procedure for reviewing court decisions that have taken effect does not constitute a remedy that has to be exhausted for the purposes of article 5, paragraph 2 (b), of the Optional Protocol[6]. In the circumstances, the Committee considers that it is not precluded by article 5, paragraph 2 (b), of the Optional Protocol from examining this part of the communication.

6.4. With regard to the authors' claim that their rights under article 14, paragraph 1, of the Covenant have been violated as one of the authors' request to have witnesses summoned for questioning in court was dismissed, the Committee notes that, in essence, the authors' complaint relates to the manner in which national courts have evaluated evidence and what specific evidence was of relevance in the framework of the court trial. The Committee observes that these allegations relate primarily to the evaluation of elements of facts and evidence by the court. It recalls that it is generally up to the courts of a State party to evaluate the facts and evidence in a particular case, unless it can be ascertained that such evaluation was clearly arbitrary or amounted to a denial of justice, or that the court otherwise violated its obligation of independence and impartiality.[7] The Committee considers that, in the present communication, the authors have failed to demonstrate that the court's conclusions in their case had reached the threshold of arbitrariness in the evaluation of the evidence or amounted to a denial of justice. Accordingly, the Committee considers that the authors have not sufficiently substantiated their allegations under article 14, paragraph 1, of the Covenant, therefore it considers this part of the communication inadmissible under article 2 of the Optional Protocol.

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[4] See, inter alia, communication No. 869/1999, *Piandiong et al. v. the Philippines*, Views adopted on 19 October 2000, para. 5.1.

[5] See, for example, communication No. 1226/2003, *Korneenko v. Belarus*, Views adopted on 20 July 2012, paras. 8.1 and 8.2.

[6] See, for example, communications No. 1785/2008, *Olechkevitch v. Belarus*, Views adopted on 18 March 2013, para 7.3; No . 1784/2008, *Schumilin v. Belarus*, Views adopted on 23 July 2012, para. 8.3; No. 1841/2008, *P.L. v. Belarus*, decision of inadmissibility adopted on 26 July 2011, para. 6.2.

6.5 As to the alleged violations of the authors' rights under article 26 of the Covenant, in the absence of any further pertinent information on file, the Committee considers that this claim is not sufficiently substantiated for purposes of admissibility, and concludes that this part of the communication is also inadmissible under article 2 of the Optional Protocol.

6.6 Finally, the Committee considers that the authors have sufficiently substantiated their remaining claims that raise issues covered by under article 19, paragraph 2, and article 21 of the Covenant for purposes of admissibility. It declares this part of the communication admissible with regard to these provisions of the Covenant and proceeds to its examination on the merits.

Consideration of the merits

7.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as required under article 5, paragraph 1, of the Optional Protocol.

7.2 The Committee notes the authors' claim that their freedom of expression and assembly has been restricted arbitrarily, since neither the decision of the Deputy Chair of Brest City Executive Committee, nor the decisions of the domestic courts provided any justification as to the reasons for the restriction to hold pickets, other than the formal application of the Executive Committee's Decision No. 1715 of 25 October 2006 which designates a sport complex outside the city centre as the ordinary location for public gatherings in Brest. The authors further claim that consigning mass events to a single location restricts the rights of all 300,000 citizens of Brest to conduct peaceful assemblies as it moves most mass events to an isolated location in a stadium that is surrounded by a concrete wall, and thus arbitrarily limits the rights guaranteed under article 21 of the Covenant.

7.3 The Committee further notes that Decision No. 1715 of Brest City Executive Committee which determines the sport stadium as the sole location for holding mass public events (with the exception of street demonstrations and street processions), and the related decisions of the domestic courts which find the restrictions imposed on the authors to be in conformity with the Law on Mass Events and the Constitution of Belarus, do not provide any justification as to the restriction imposed. In particular, the Committee notes the decision of 9 April 2009 of the Brest Regional Court within cassation proceedings, whereby it concluded that the authors application to hold pickets at the desired location was refused lawfully on the basis of Decision No. 1715 which prescribes that mass events, including pickets, i.e. a possibility to congregating at a specific location with the intent of supporting or disapproving a particular cause, with or without informative materials, are to be held in the Lokomotiv sports stadium.

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[7] See, inter alia, communications No. 1188/2003, *Riedl-Riedenstein et al. v. Germany*, decision of inadmissibility adopted on 2 November 2004, para. 7.3; No. 1138/2002, *Arenz et al. v. Germany*, decision of inadmissibility adopted on 24 March 2004, para. 8.6.

7.4 The Committee recalls that the right of peaceful assembly, as guaranteed under article 21 of the Covenant, is a fundamental human right that is essential for public expression of one's views and opinions and indispensable in a democratic society. This right entails the possibility of organizing and participating in a peaceful assembly, including the right to a stationary assembly (such as a picket) in a public location. The organizers of an assembly generally have the right to choose a location within sight and sound of their target audience and no restriction to this right is permissible, unless (a) imposed in conformity with the law, and (b) necessary in a democratic society, in the interests of national security or public safety, public order, protection of public health or morals or protection of the rights and freedoms of others. When a State party imposes restrictions with the aim of reconciling an individual's right to assembly and the aforementioned interests of general concern, it should be guided by the objective to facilitate the right, rather than seeking unnecessary or disproportionate limitations to it. The State party is thus under the obligation to justify the limitation of the right protected by article 21 of the Covenant.

7.5 In the present case, a pedestrian zone in the city of Brest was chosen by the authors as the intended location to hold a picket, from 1 p.m. to 3 p.m. on three consecutive days, with the aim of drawing citizens' attention to the issues regarding the erection of a monument devoted to the 1,000th anniversary of Brest, but their request was rejected. In these circumstances and in absence of any explanations from the State party, the Committee finds the decision of the State party's authorities denying the authors' right to assemble peacefully at the public location of their choice to be unjustified. The Committee also notes, based on the material on file, that in their replies to the authors, the national authorities failed to demonstrate how a picket held in the said location would necessarily jeopardize national security, public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others. The Committee notes that the thus de facto prohibition of an assembly in any public location in the entire city of Brest, with the exception of the Lokomotiv stadium, unduly limits the right to freedom of assembly. In these circumstances, the Committee concludes that the authors' right under article 21 of the Covenant has been violated.

7.6 The Committee notes the authors' claim that their right to impart information regarding the problems that occurred in the course of the preparation of a monument dedicated to the 1,000th anniversary of Brest is protected under article 19, paragraph 2, of the Covenant. The authors assert that the restriction in question was neither justified by reasons of national security, nor public safety, public order, the protection of public health or morals, and was not necessary for the protection of the rights and freedoms of others, and was therefore a breach of their rights under article 19, paragraph 2, of the Covenant.

7.7 The Committee recalls that article 19, paragraph 3, of the Covenant allows certain restrictions only as provided by law and necessary (a) for the respect of the rights and reputation of others, and (b) for the protection of national security or public order (ordre public) or public health or morals. The Committee refers to its general comment No. 34, which states that freedom of opinion and freedom of expression are indispensable conditions for the full development of the person, and such freedoms are essential for any society. They constitute the foundation stone for every free and democratic society.[8] Any restriction on the exercise of such freedoms must conform to the strict tests of necessity and proportionality. Restrictions must be applied only for those purposes for which they were prescribed and must be directly related to the specific need on which they are predicated.[9]

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[8] See the Committee's general comment No. 34 (2011) on freedoms of opinion and expression, para. 2, *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 40*, vol. I (A/66/40 (Vol. I)), annex V.

7.8 The Committee recalls[10] that it is for the State party to demonstrate that the restrictions on the authors' rights under article 19 were necessary and justified, and that even if, in principle, States parties may introduce a system aimed at reconciling an individual's freedom to impart information and the general interest of maintaining public order in a certain area, such system must not operate in a way that is incompatible with article 19 of the Covenant. The Committee notes that the State party has not submitted any observations on the merits of the present communication. However, the Committee points out that the national authorities refused to allow the authors to hold pickets at the location of their choice and thus restricted their right to impart their concerns regarding the erection of a monument dedicated to the 1,000th anniversary of Brest, solely on the grounds that according to Brest City Executive Committee Decision No. 1715 of 25 October 2006, a particular place has been designated for such mass events. In this regard, the Committee notes that the national authorities have not explained how the restrictions imposed on the authors' rights under article 19 of the Covenant were justified under article 19, paragraph 3, of the Covenant. In the circumstances, and in the absence of any information in this regard from the State party to justify the restriction for purposes of article 19, paragraph 3, of the Covenant, the Committee concludes that the authors' rights under article 19, paragraph 2, of the Covenant have been violated.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the State party has violated the authors' rights under article 19, paragraph 2, and article 21 of the International Covenant on Civil and Political Rights. The Committee reiterates its conclusion that the State party has also breached its obligations under article 1 of the Optional Protocol.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the authors with an effective remedy, including reimbursement of any legal costs incurred by the authors, together with compensation. With a view to ensuring that the rights under article 21 of the Covenant may be fully enjoyed in the State party, the State party should also review the national legislation as it has been applied in the present case. The State party is also under the obligation to take steps to prevent similar violations in the future.

10. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views, and to have them widely disseminated in Belarusian and Russian in the State party.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

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[9] Ibid., para. 22.

[10] See, for example, communications No. 1830/2008, *Pivonos v. Belarus*, Views adopted on 20 October 2012, para 9.3; No. 1785/2008, *Olechkevitch v. Belarus*, Views adopted on 18 March 2013, para 8.5.

EE. Communication No. 1955/2010, *Al-Gertani v. Bosnia and Herzegovina* (Views adopted on 1 November 2013, 109th session)[*]

Submitted by:	Zeyad Khalaf Hamadie Al-Gertani (represented by counsel, Nedzmija Kukricar)
Alleged victim:	The author
State party:	Bosnia and Herzegovina
Date of communication:	4 June 2010 (initial submission)
Subject matter:	Deportation to Iraq
Procedural issue:	Exhaustion of domestic remedies; insufficient substantiation
Substantive issues:	Risk of torture and other cruel, inhuman or degrading treatment or punishment upon return to country of origin; prohibition of refoulement; arbitrary and unlawful interference with privacy and family life; prohibition of discrimination
Articles of the Covenant:	6, 7, 9 (paras. 1, 2 and 4), 13, 14, 17, 23, 24 and 26
Article of the Optional Protocol:	2, 5 (para. 2 (b))

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 1 November 2013,

Having concluded its consideration of communication No. 1955/2010, submitted to the Human Rights Committee by Zeyad Khalaf Hamadie Al-Gertani under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The author of the communication is Zeyad Khalaf Hamadie Al-Gertani, an Iraqi national, born on 30 March 1970. He claims to be the victim of a violation by the State party of his rights under articles 6, 7, 9 (paras. 1, 2 and 4), 13, 14, 17, 23, 24 and 26 of the Covenant. At the time he submitted the communication, he was detained in an immigration centre in Eastern Sarajevo, awaiting removal to Iraq. The author is represented by counsel. The Optional Protocol entered into force for the State party on 1 June 1995.

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[*] The following members of the Committee participated in the examination of the present communication: Mr. Yadh Ben Achour, Mr. Lazhari Bouzid, Mr. Ahmad Amin Fathalla, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Walter Kälin, Ms. Zonke Zanele Majodina, Mr. Gerald L. Neuman, Sir Nigel Rodley, Mr. Victor Manuel Rodriguez-Rescia, Mr. Fabián Omar Salvioli, Ms. Anja Seibert-Fohr, Mr. Yuval Shany, Mr. Konstantine Vardzelashvili and Ms. Margo Waterval.

1.2 On 14 June 2010, the Special Rapporteur on new communications and interim measures, acting on behalf of the Committee, requested the State party, pursuant to rule 92 of the Committee's rules of procedure, to refrain from deporting the author to Iraq while his case is under consideration by the Committee. On 15 December 2010, the State party informed the Committee that the author's deportation had been suspended in the light of the Committee's request and that, having been considered a threat to the State party's national security, the author would remain under measures of control (surveillance) in the immigration centre in Sarajevo, which he was forbidden to leave.

Factual background

2.1 The author is a Sunni Iraqi. He claims that his mother's family was affiliated with Saddam Hussein's regime and, in particular, that his brother was a member of the Republican Guard. He states that in 1989 he began his military service in the Iraqi army; that in February or March 1991 he deserted the army when Iraq occupied Kuwait; and that following his desertion, he hid in the suburbs of Baghdad with relatives. The author claims that he later learned through his relatives that he had been sentenced to death in absentia and that his brother had been expelled from the army and sentenced to one year in prison as a result of the author's desertion.

2.2 According to the author, he spent nine months hiding in Mosul and Arbil, in Iraqi Kurdistan. He managed to obtain a forged passport issued by the "Iraqi Kurdistan's authorities" and, feeling unsafe, he travelled to the Islamic Republic of Iran, Pakistan and the Sudan. Later he went to Yemen, where he resided for 11 months. He obtained a new forged Yemeni passport under the identity of Abdulla Seid Ali Ba-Awra, the name of a friend, and travelled to the Syrian Arab Republic and Turkey. Subsequently, he moved to Croatia and arrived in Bosnia and Herzegovina in September 1995.

2.3 In November 1995, he married a woman who was a national of Bosnia and Herzegovina. They have three minor children. He settled in Bosnia and Herzegovina and worked in the used-car business. On 4 January 1996, the Ministry of Internal Affairs granted him citizenship of Bosnia and Herzegovina under the name Abdulla Seid Ali Ba-Awra.

2.4 The author maintains that in 2003 he reported his true identity to the authorities of the Ministry of Internal Affairs of the Zenica-Doboj Canton and informed them that his full name was Zeyad Khalaf Hamadie Al-Gertani. However, they did not take him seriously as he did not provide any documents to prove his real identity. In 2005 his brother managed to obtain an identification card for him in Baghdad, which was subsequently submitted by the author to the State party's authorities. On 29 January 2007, the citizenship he had been granted was revoked by the State Commission for the Revision of Decisions on Naturalization of Foreign Citizens on the grounds that he had obtained it under a false identity.

2.5 On 3 or 4 May 2009, by decision of the Service for Foreigners' Affairs the author was apprehended and placed in an immigration centre in Eastern Sarajevo until 3 June 2009, on the grounds that he was considered a threat to the legal system, public order, peace and security of Bosnia and Herzegovina and of reasonable doubt regarding his real identity, pursuant to article 99, paragraph 2 (b) and (c), of the Law on Movement and Stay of Aliens and Asylum. The author submitted an appeal against this measure to the Court of Bosnia and Herzegovina. On 8 May 2009, the author's application was rejected. Subsequently, the detention order has been extended periodically and the author has remained in detention since then.

2.6 On 13 May 2009, the author lodged a request for international protection to the Asylum Sector of the Ministry of Security in accordance with the Law on Movement and

Stay of Aliens and Asylum and claimed that he could not take his wife and children, nationals of Bosnia and Herzegovina, to a country at war, as they would be exposed to human rights violations. On 18 and 20 May 2009, the author was interviewed by the authorities in the presence of his legal counsel and a representative of the Office of the United Nations High Commissioner for Refugees. He claimed that he feared he would be killed or tortured if returned to Iraq since he had been sentenced to death, there was a civil war, and the country was governed by Shiites, whereas he was a Sunni. He further claimed that at the time he deserted, a person sentenced to the death penalty by a military court was executed immediately. For this reason, he had to escape quickly and only learned about the sentence later, through his family. He pointed out that even without a verdict against him, he would be in danger due to his ethnic origin. He also mentioned that he belonged to a well-known Sunni family, that several of his relatives had been killed, and that his family had fled to the Syrian Arab Republic or to the Iraqi border with that country. As to the use of a Yemeni passport in the name of Abdulla Seid Ali Ba-Awra, the author stated that he did not use his real identity in order to protect himself from reprisals from the former Iraqi regime.

2.7 On 28 May 2009, the author's asylum request was dismissed by the Asylum Sector of the Ministry of Security pursuant to articles 105, 106 (para. 4 (a)), 109 (para. 6), 116 (para. 1 (c)) and 118 of the Law on Movement and Stay of Aliens and Asylum, as the State party's Intelligence and Security Agency had placed the author on the list of persons posing a threat to the State's security. Furthermore, his application did not disclose grounds for applying the principle of non-refoulement since the author's accounts lacked credibility and the grounds provided for his request for protection were not reasonable. He was given 15 days to leave the State party's territory. In the decision it was pointed out that although there were concerns about the human rights situation in Iraq, international reports indicated that members and supporters of the former regime and those who were affiliated to the Ba'ath party were at risk, whereas Sunnis per se did not face such danger. In this respect, the decision held that the author did not support the previous regime, as indicated by his desertion from the army; that his brother had been relieved of his duties in the Republican Guard and sentenced by the previous regime; and that the author's allegation that his family was a well-known Sunni family was not documented. His alleged death sentence, if imposed, would have been pronounced in the early 1990s, during a regime that was overthrown in 2003 when the Shiites came to power, and there was no indication that the new regime would execute the sentence. Moreover, on 15 July 2007, one of the author's relatives obtained for him a citizenship certificate in Baghdad; on 11 May 2008, the author obtained a copy of his Iraqi passport, issued by the Embassy of Iraq in Vienna and valid until 2016; and when the State party's authorities placed the author under measures of control (surveillance), his wife contacted the Embassy of Iraq in Belgrade and requested assistance. Finally, it was established that, despite the violent situation in Iraq, Sunnites were not subject to systematic persecution.

2.8 On 29 May 2009, the Asylum Sector of the Ministry of Security extended for a period of 90 days, as of 4 June 2009, the measures imposed on the author with regard to restriction of movement and the prohibition on leaving the facilities of the immigration centre in Sarajevo.

2.9 On 10 June 2009, the author filed an application against the denial of international protection before the Court of Bosnia and Herzegovina and maintained that the decision was arbitrary. He claimed that there was an incorrect and incomplete understanding of the facts as to the risk he faced in Iraq; that the findings that he posed a threat to the public order or security were not justified or supported by any evidence; and that the authorities had failed to take into consideration the human rights situation in Iraq, which resulted in an incorrect assessment of the factual situation and the risk that the author would face if deported. He further argued that the international reports consulted by the authorities revealed a climate of violence, including from sectarian and party-influenced militias, and human rights violations.[1] As to his family situation, he claimed that the authorities failed to consider whether his potential departure would significantly affect his family; that his family's assimilation into Iraqi society would not be possible given that they were nationals of Bosnia and Herzegovina, did not speak Arabic, and did not have any ties with Iraq.

2.10 On 26 August 2009, the Ministry of Security extended the measures of restriction of movement against the author for 90 days, since the appeal filed by him was still pending.

2.11 On 18 November 2009, the Court of Bosnia and Herzegovina rejected the author's application against the decision that revoked his Bosnia and Herzegovina citizenship. The author appealed this decision to the Constitutional Court. At the time the author submitted his communication to the Committee, his appeal was still pending.

2.12 On 23 November 2009, the Court of Bosnia and Herzegovina rejected the author's application against the denial of protection. The Court stated that in rejecting the author's request for international protection pursuant to articles 105, 106 (4), and 118 of the Law on Movement and Stay of Aliens and Asylum, the Ministry of Security had examined whether the author fulfilled the conditions for protection in accordance with the principle of non-refoulement. However, after a full and detailed examination of the information provided by the author, it concluded that his allegations of fear of being persecuted were unfounded. The Court pointed out that the author had left the State party's territory several times in 1995; that he and his family went to Dubai on vacations; and that he had gone to Hungary, where he filed an asylum request that was later withdrawn. He did not prove before the Ministry of Security that a death sentence against him had actually been passed, and during the interviews he repeatedly avoided providing specific answers to the questions posed by the authorities. Given that the author was considered a threat to the public order and safety of the nation, the order to leave the State party's territory was legal and did not violate the author's right to family and private life since its exercise must be in line with the public interest and the State's national security. Since it was a final decision, on 30 November 2009 the Ministry of Security imposed on the author a measure of control (surveillance), keeping him in the immigration centre in Sarajevo, without permission to leave. This measure was extended every 30 days.

2.13 On 15 December 2009, the author lodged an application with the Constitutional Court against the ruling of the Court of Bosnia and Herzegovina, and a request for interim measures in order to suspend his deportation. The author claimed that the judgement of the Court of Bosnia and Herzegovina was unlawful as it violated his fundamental rights: the prohibition of torture, inhuman or degrading treatment or punishment; the right to private and family life; the right to an effective remedy; the right to free enjoyment of his rights without discrimination; and the right to contest the removal order and to a judicial review, as enshrined in the Constitution and in the European Convention for the Protection of Human Rights and Fundamental Freedoms. The author reiterated his claims and pointed out that the Ministry of Security did not explain why it considered that the entry "Abdulla Ba-Awra born on August 1974 in Kuwait" that appeared in the list of persons who were classified as posing a threat to the national security referred in fact to the author (Zeyad Khalaf Hamadie Al-Gertani, born on 30 March 1970 in Baghdad). Further, he argued that a person should not be returned to a place where he would be subjected to torture or other severe ill-treatment regardless of how unwelcome or dangerous he might be for the State which examined the request for international protection.

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[1] The author refers to *UNHCR Eligibility Guidelines For Assessing the International Protection Needs of Iraqi Asylum-seekers* (April 2009), which states that Iraqi asylum seekers from five central Governorates, among them Baghdad, should be considered in need of international protection. If they are found not eligible for refugee status, they should still be considered to be at risk of serious harm in the situation of armed conflict, which is ongoing in Iraq.

2.14 On 25 February 2010, the Constitutional Court rejected the author's request for measures to suspend his deportation, as no decision had been made on his forced removal from the State party's territory if he failed to leave the territory voluntarily.

2.15 On 4 May 2010, the Service for Foreigners' Affairs of the Ministry of Security issued an expulsion order against the author and imposed on him a five-year prohibition on entering and staying in Bosnia and Herzegovina. He appealed the expulsion order on 12 May 2010. On 13 May 2010, he filed a second request for interim measures with the Constitutional Court on the grounds that an expulsion order had been issued against him. On 28 May 2010, the Ministry of Security rejected the appeal against the expulsion order.

The complaint

3.1 The author claims that his deportation to Iraq by the State party would constitute a violation of articles 6, 7, 13, 14, 17, 23, 24 and 26 of the Covenant.

3.2 The author holds that the State party's authorities did not assess adequately the risk that he would be subject to if returned to Iraq, notably that he would face a real risk of being detained immediately, tortured and killed. Therefore, his return to Iraq by the State party would constitute a violation of articles 6 and 7 of the Covenant. The author contends that Sunni Arabs face a particular risk of being detained, tortured and executed for alleged involvement in or supporting Sunni armed groups; that the execution of death penalties in Iraq imposed against alleged insurgents has increased; and that the Iraqi authorities will perceive him as being affiliated with the former regime and/or with those armed groups.[2] In the light of the circumstances and his personal and family background, he would attract the attention of the Iraqi authorities at the airport and be considered a potential threat, especially if he were to be returned from Bosnia and Herzegovina by force. He faces a real risk of being executed for the crime of compromising the internal security of Iraq on the mere ground that he is a Sunni Arab related to the former regime and because of his detention on security grounds in Bosnia and Herzegovina. Furthermore, the death sentence imposed on him for deserting the Iraqi army would still apply even if it was decided under the former regime.

3.3 With regard to articles 13 and 14, read in conjunction with article 2, paragraph 3, the author contends that his request for international protection was denied on grounds of threat to the public order and national security, but he was not informed why he was considered a threat. He was not provided with any facts, let alone evidence, relating to this threat and this issue was not even mentioned during the proceedings related to his request for international protection. The authorities merely referred to a list with names of persons who allegedly represented a security threat. The author submits that a security threat allegation has to be corroborated if it serves as a basis for an expulsion or prolonged detention. Therefore, the procedural safeguards set out in article 13 with regard to expulsions were violated, and he did not receive a fair and public hearing in accordance with article 14 of the Covenant.

3.4 With regard to the author's claims of violation of articles 17, 23 and 24 of the Covenant, he submits that his detention and possible deportation constitute an arbitrary and unlawful interference with his privacy and family life. His wife and minor children are nationals of Bosnia and Herzegovina, do not speak Arabic, and have no ties whatsoever to the Iraqi culture. They cannot follow him to a country facing a civil war with a deplorable security situation. Therefore, the execution of the expulsion order in practice would entail splitting up his family for several years with a negative impact on the well-being of his children. In this regard, the authorities failed to assess properly the seriousness of the interference with the author's family life and the best interests of the children as defined in article 3 of the Convention on the Rights of the Child. Recalling the Committee's general comment No. 15 (1986) on the position of aliens under the Covenant,[3] the author claims that although the Covenant does not recognize the right of aliens to enter or reside in the territory of a State party and that it is in principle a matter for the State to decide who it will admit to its territory, there are certain circumstances in which an alien may enjoy the protection of the Covenant in relation to entry or residence in a country, in particular when there are considerations of respect for family life.

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[2] The author refers to *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Iraqi Asylum-seekers* and Amnesty International, *Iraq: Human Rights Briefing* (March 2010).

3.5 As to his claim under article 26, the author submits that the determination made by the authorities that he posed a threat to national security, which served as the main reason for detaining him and expelling him from the country in which he had been living for almost 15 years, was based on prejudices against persons of Arab origin who practise Islam.

State party's observations on admissibility

4.1 On 13 October 2010, the State party provided its observations on the admissibility of the communication.

4.2 The State party points out that the author entered Bosnia and Herzegovina illegally under someone else's name, as Abdulla Ba Awra Said Ali, as a national of Yemen and with a Yemeni passport. On the basis of documentation of the Embassy of Iraq and the International Criminal Police Organization (INTERPOL) and other evidence, the authorities found that author's actual identity is Zeyad Khalaf Hamadie Al-Gertani. The revocation of his Bosnia and Herzegovina citizenship and rejection of his request for international protection were based in part on grounds of threat to the public order, peace and national security as established in a document classified as "confidential" by the Intelligence and Security Agency. The author only applied for international protection two years after his citizenship was revoked by the State party, and when certain control measures were imposed against him. The State party maintains that the purpose of his request was to delay his deportation and represented an abuse of the right to request international protection.

4.3 The author filed an appeal before the Court of Bosnia and Herzegovina against the Ministry of Security's decision of 28 May 2010, which confirmed the expulsion order against him. However, at the moment of presentation of the State party's observations the Court's decision in that proceeding was still pending.

4.4 On 28 July 2010, the Office for Foreigners' Affairs extended the measure of control (surveillance) that placed the author in the immigration centre to 5 September 2010, limiting his right to free and unrestricted movement. The author appealed this decision to the Ministry of Security. On 29 July 2010, his appeal was rejected. Subsequently, the author instituted proceedings before the Court of Bosnia and Herzegovina against this decision. At the time of presentation of the State party's observations, no decision had been taken by the Court. The State party further notes that the start of proceedings against the decision on deportation did not have suspensive effect and therefore did not delay the execution of the decision on deportation.

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[3] See *Official Records of the General Assembly, Forty-first Session, Supplement No. 40* (A/41/40), annex VI, para. 5.

4.5 During the proceedings the Ministry of Security and the Court of Bosnia and Herzegovina considered all the author's allegations. The authorities did not only limit themselves to concluding that he was a threat to the State's security, but also examined his request within the framework of article 91 of the Law on Movement and Stay of Aliens and Asylum and assessed the alleged danger or risk to which the author would be exposed if deported to Iraq. The author's rights under articles 6, 13, 14, 17, 23, 24 and 26 of the Covenant were not violated while his request for international protection was being considered. In addition, the State party maintains that the author's right to liberty of movement could be subject to restriction under exceptional circumstances, for instance, to protect national security and public order. Further, the involvement of public authorities for the purpose of protection of national interests is necessary in a democratic society. If a decision is taken in this regard, such a decision prevails over the right to privacy and family life.

4.6 In the light of the above, the State maintains that the author's communication is not sufficiently substantiated and that therefore it should be declared inadmissible.

State party's observations on the merits

5.1 On 15 December 2010, the State party provided its observations on the merits of the communication.

5.2 The State party informed the Committee that after the Court of Bosnia and Herzegovina confirmed, on 23 November 2009, the denial of his request for international protection, the author continued under measures of control (surveillance) and he could not leave the immigration centre in Sarajevo; that these measures had been extended on a monthly basis by the Service for Foreigners' Affairs; and that they had been reviewed by the Ministry of Security and the Court of Bosnia and Herzegovina, as appeal instances.

5.3 The State party notes that the decision for the author's removal to his country of origin was taken in accordance with articles 16, 88 (para. 1), and 117 of the Law on Movement and Stay of Aliens and Asylum, which provide that once an application for international protection is rejected by way of a final legally binding decision, the person shall be expelled from the country. As to the measure of control, article 99 of the Law on Movement and Stay of Aliens and Asylum provides that an alien will be placed under surveillance to ensure that a decision on expulsion may be executed, and if there are reasonable grounds to believe that he could threaten the public order or security of the State party. According to article 102, such a measure of control shall not last more than 180 days. In exceptional circumstances, if it is not possible to remove the alien within the 180-day period, the total duration of surveillance may be extended for a period longer than 180 days.

5.4 The State party reiterates that the Ministry of Security and the Court of Bosnia and Herzegovina considered and assessed the author's allegations that his deportation to Iraq would put him at serious risk of treatment contrary to the Covenant.

5.5 As to the author's claim concerning his right to privacy and family life, the State party submits that it is not an absolute right and that it may be restricted for reasons of public interest. In this regard, the established facts show that the author is a "social threat". Furthermore, should the author's allegation be correct, it would confer a sort of permanent immunity to foreigners in similar situations, which would be contrary to the protection of the right to private and family life.

5.6 The measures of control and surveillance against the author were adopted by the competent bodies within the statutory procedure. The length of these measures and their extension beyond 180 days is a consequence of the proceedings instituted by the author and the decisions taken by the institutions that considered his applications, such as the Committee's request for interim measures. All these measures, as well as the decision on the author's request for international protection, were considered and reviewed in a fair and thorough manner by the administrative and judicial authorities.

5.7 As regards the author's claims of violation of articles 24 and 26 of the Covenant, the State party maintains they are not substantiated. The author had access to administrative and judicial proceedings in order to challenge all the decisions against him without discrimination, as established by the Law on Movement and Stay of Aliens and Asylum. The Service for Foreigners' Affairs did not take any steps with regard to the author's expulsion until the decision on his request for international protection became final. On the other hand, the author's allegations do not show beyond a mere assertion how his children's rights were violated.

Author's comments on the State party's observations

6.1 On 31 December 2010 and 4 March 2011, the author provided his comments on the State party's observations on admissibility and merits.

6.2 The author informed the Committee that he appealed the Ministry of Security's decision of 28 May 2010 that confirmed the expulsion order before the Court of Bosnia and Herzegovina and requested interim measures, as the appeal application did not have automatic suspensive effects according to article 4, paragraph 3, of the Law on Movement and Stay of Aliens and Asylum and article 18, paragraph 1, of the Law on Administrative Disputes. Nonetheless, the Court of Bosnia and Herzegovina refused to decide on the interim measures request and simply referred the matter to the Ministry of Security, which rejected this request on 11 June 2010. Therefore, the appeal to the Court of Bosnia and Herzegovina did not turn out to be an effective remedy to challenge the deportation orders. Moreover, the forwarding of the consideration of the request for interim measures to a party in the appeal proceeding — the Ministry — seriously compromised the right to a fair hearing.

6.3 As to the request he made to the Constitutional Court for interim measures, the author argues that, due to the excessive length of time that the Constitutional Court takes to decide on this kind of request, in practice it cannot be considered an effective remedy to challenge a deportation that would constitute a violation of articles 6 and 7 of the Covenant. Notwithstanding, after the expulsion order was issued against him, he brought the matter to the Constitutional Court and requested interim measures. However, at the time of his submission to the Committee, on 31 December 2010, no decision had been issued by the Court. Finally, the author also holds that, as acknowledged by the State party in its observations, the appeal proceeding against the decision on the enforcement of the expulsion does not stay the deportation order pursuant to articles 4 (para. 3), 89 (para. 5), and 93 (paras. 2 and 3) of the Law on Movement and Stay of Aliens and Asylum.

6.4 On 27 November 2010, the Constitutional Court delivered its judgement concerning the author's appeal against the Ministry of Security's decision of 28 May 2009 and the Court of Bosnia and Herzegovina's judgement of 23 November 2009, which rejected the author's request for international protection. The Constitutional Court dismissed the author's application and stated that "there could not be a connection between the administrative/judicial procedure, whereby the appellant's application for international protection was rejected, and the violation of the right not to be subjected to torture or inhuman and degrading treatment".[4] It also found that the expulsion order and denial of international protection did not constitute an arbitrary interference with the author's right to family life. In the light of the above, the author claims that he exhausted all domestic remedies and that there is no effective domestic remedy left at his disposal to prevent his deportation to Iraq.

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[4] English translation of the Constitutional Court's judgement provided by the author, and transmitted to the State party.

6.5 The author maintains that during the proceedings he was never confronted with any facts or evidence related to him as a threat to the national security or public order. Neither the Ministry of Security nor the Court of Bosnia and Herzegovina provided the reasons why he was considered a threat to the State party's security and limited their assessments to making a mere reference to a list that allegedly included his name. Even if this were the case, the State party could not disregard the fact that it was obliged not to return or remove a person to a place where he or she would be subjected to a treatment contrary to articles 6 and 7 of the Covenant. The author asserts that the State party does not provide any observation as to the alleged risk he would face if deported. Further, since the State party contacted the Iraqi authorities with a view to deporting him, there is no doubt that these authorities are fully aware of the circumstances of his possible deportation, which increases the chances that he would be detained upon arrival in Iraq.[5]

6.6 The author points out that his initial communication did not raise any issue concerning the arbitrariness and length of the measures of control imposed on him, in particular his continued detention, as these issues were still pending before the Constitutional Court and he considered that proceeding an effective remedy. However, given the State party's reiterated observations on these measures and the fact that his detention had lasted 22 months, the author argues that in practice the proceedings before the Constitutional Court turned out to be ineffective to protect against a violation of article 9 of the Covenant.

6.7 The author claims that it is questionable that his initial detention served the purpose of securing his deportation and that, rather, it was decided for preventive reasons based on the grounds of an uncorroborated security threat. He points out that when he was placed in the immigration centre, the authorities had not even started proceedings to enforce the expulsion order.

6.8 The arbitrariness of the author's detention is also reflected in the fact that the Ministry of Security did not impose any kind of measure of control at the time his citizenship of Bosnia and Herzegovina was revoked in 2007. Although there were no significantly altered circumstances, more than two years later, on 4 May 2009, he was considered a threat to the State party's security and placed in detention at an immigration centre. The review of this measure by the Court of Bosnia and Herzegovina was also arbitrary. In its judgement of 30 April 2010, the Court granted the appeal against the decision of the Ministry of Security, dated 27 April 2010, which extended the author's detention, since it raised concerns under article 5 of the European Convention on Human Rights. On 4 May 2010, the same ministry issued a new decision that prolonged his detention. Surprisingly, and even though the ministry fully disregarded the Court's judgement of 30 April 2010, the author's appeal against this latter decision was rejected by the Court on 12 May 2010. This inconsistent approach of the Court of Bosnia and Herzegovina corroborates that the author's detention amounts to an arbitrary deprivation of his liberty contrary to article 9, paragraphs 1, 2 and 4, of the Covenant.

Additional observations of the State party

7.1 On 21 June 2011 and 10 January, 18 May and 9 October 2012, the State party provided additional observations.

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[5] The author refers to the Committee against Torture's concluding observations on Bosnia and Herzegovina (CAT/C/BIH/CO/2-5), para. 14.

7.2 The State party maintains that the author's allegations concerning the measures of surveillance in the immigration centre in Sarajevo were imprecise. His continued detention is reasonable and justified for reasons of public interest and security. According to the reasons contained in the decisions which imposed and subsequently extended these measures, originally the surveillance was imposed with a view to establishing the author's identity and because he was considered a security threat to the State party. Later this measure was justified with a view to ensuring his deportation and because he was still considered a security threat. This measure was also extended in the light of the Committee's request for interim measures, the authorities' conclusion that he was a threat to the State party's security, and the fact that he did not have a residence permit in Bosnia and Herzegovina. The author had the opportunity to challenge these measures before the Ministry of Security and the Court of Bosnia and Herzegovina. Against this background, the length of the measure of surveillance cannot be attributed to the State party. Moreover, despite the complexity of the case, the decisions concerning the measure of surveillance, the author's request for international protection, and the expulsion order, as well as the subsequent appeals by the author, were taken by the authorities within a short time frame.

7.3 The Service for Foreigners' Affairs was not obliged to inform the author about the reasons why he was considered a threat to State security, since the legal grounds for imposing the measure of surveillance were clearly presented in the original decision of 4 May 2009. In this respect, the measure was not based on the fact that his Bosnia and Herzegovina citizenship was under a revocation proceeding, but on relevant information and evidence that showed a reasonable suspicion about his identity. Therefore, the decision imposing the measure of surveillance and all its extensions were adopted in accordance with article 9 of the Covenant.

Additional comments of the author

8.1 On 15 November 2011, 27 March 2012 and 23 July 2012, the author provided further comments. He reiterates his previous allegations as to the risk he would face if deported to Iraq; the arbitrariness and length of the measure of surveillance imposed on him; and his right to family life.

8.2 The author argues that the length of the proceedings and of the measure of surveillance cannot be attributed to him. The proceedings he instituted were based on his right to access to legal remedies under article 2, paragraph 3, of the Covenant.

8.3 It is questionable that the author's detention continued to be lawful under article 9 of the Covenant after 14 June 2010, when the Committee issued an interim measures request, asking the State party to refrain from deporting him while his communication was under its consideration. Moreover, his detention for the period during which the authorities examined his request for international protection was not in compliance with the law and violated article 143 of the Law on Movement and Stay of Aliens and Asylum, which establishes that chapter VI (on reception of aliens and supervision/detention) is not applicable to asylum seekers. While his request was under consideration, the authorities could only impose measures of restriction of movement, which do not include deprivation of liberty, for a period of 180 days. Therefore, his rights under article 9, paragraphs 1, 2 and 4, of the Covenant were violated.

Issues and proceedings before the Committee

Consideration of admissibility

9.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the case is admissible under the Optional Protocol to the Covenant.

9.2 The Committee has ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

9.3 With regard to the requirement set out in article 5, paragraph 2 (b), of the Optional Protocol, the Committee refers to its jurisprudence and recalls that the determination whether or not all remedies have been exhausted is made at the time a communication is being examined.[6] In the present case, the Committee observes that the author's request for international protection was rejected by the Court of Bosnia and Herzegovina on 23 November 2009 and that the Constitutional Court found this decision lawful on 27 November 2010. The Committee takes note of the State party's acknowledgement that the appeal proceeding against the expulsion order issued by the Service of Foreigners' Affairs on 4 May 2010 does not stay the deportation, and observes that the author's requests for interim measures, submitted within these proceedings, were dismissed. The Committee also notes that the measures of surveillance (detention orders) imposed on the author and their extensions were also challenged by the author before the administrative and judicial authorities without success. In the absence of any observations by the State party on this subject, the Committee finds that there is no obstacle to the admissibility of the communication under article 5, paragraph 2 (b), of the Optional Protocol.

9.4 The Committee takes note of the author's allegations under articles 6, 7, 13 and 14 of the Covenant that the authorities failed to assess the risk to which he would be subject to if returned to Iraq and that they did not take into account his personal circumstances and the events he went through in Iraq prior to his departure. It also notes that his request for international protection was denied on grounds of threat to the public order and national security; however, he was not provided with any facts or evidence relating to this threat and the authorities merely referred to a list with names of persons who allegedly represented a security threat. Against this background, his right to access to an effective remedy in order to challenge the lawfulness of his deportation to Iraq was seriously undermined.

9.5 The Committee observes that during the consideration of the author's request for international protection he was interviewed twice, on 18 and 20 May 2009, by the authorities, in the presence of his legal counsel and a representative of the Office of the United Nations High Commissioner for Refugees; during the proceedings the author did not provide any documentation in support of his allegations regarding the risk to which he would be subjected if returned to Iraq, in particular with reference to his death sentence. The Committee also observes that, through his relatives, the author was able to obtain identity documents from the Iraqi authorities in Baghdad and to submit them within the proceedings regarding the revocation of his Bosnia and Herzegovina citizenship. After he was placed in detention, his wife contacted the Iraqi Embassy in Belgrade for assistance. The Committee also observes that the author's request for international protection was considered by the Ministry of Security and later reviewed by the Court of Bosnia and Herzegovina and the Constitutional Court. In rejecting that request the Ministry of Security and the courts did not limit their assessments to their expressed concerns regarding the State's party security, but considered also the author's claims about the possible risk that he would face if deported to Iraq, and concluded that he was not in need of international protection. In the circumstances, the Committee considers that the author's claims under articles 6, 7, 13 and 14 have not been sufficiently substantiated for purposes of admissibility and declares them inadmissible under article 2 of the Optional Protocol.

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[6] See communications No. 1876/2009, *Ranjit Singh v. France*, Views adopted on 22 July 2011, para. 7.3; No. 1228/2003, *Lemercier v. France*, decision of inadmissibility adopted on 27 March 2006, para. 6.4; No. 1045/2002, *Baroy v. Philippines*, decision of inadmissibility adopted on 31 October 2003, para. 8.3; and No. 1069/2002, *Bakhtiyari v. Australia*, Views adopted on 29 October 2003, para. 8.2.

9.6 The Committee also takes note of the author's allegation under article 26 that the determination made by the authorities that he was a threat to national security was based on prejudices against persons of Arab origin who practise Islam. The Committee considers that this claim has been insufficiently substantiated for purposes of admissibility and declares it inadmissible under article 2 of the Optional Protocol.

9.7 The Committee takes note of the author's allegations under article 9, paragraphs 1, 2 and 4, of the Covenant, that on 4 May 2009 he was placed under a measure of control (surveillance) in an immigration centre in Sarajevo as he was considered a threat to the State party's national security; that he has been in detention since then; and that although he appealed this measure and its extensions before the Ministry of Security and courts, in practice he was unable to challenge the grounds on which it was based, since the State party failed to provide him with the reasons or evidence that led to the conclusion that he represents a threat to the national security. The Committee considers that, for the purpose of admissibility, the author has provided sufficient details and substantiation concerning his allegations under article 9, paragraphs 1, 2 and 4, of the Covenant and declares them admissible.

9.8 Regarding the author's claims under articles 17, 23 and 24, the Committee considers that, for the purpose of admissibility, the author has provided sufficient details and substantiation and declares them admissible.

Consideration of the merits

10.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as required under article 5, paragraph 1, of the Optional Protocol.

10.2 As regards the author's claim that his detention was arbitrary under article 9, paragraphs 1, 2 and 4, the Committee notes that the author was placed under measures of surveillance (detention) in an immigration centre in Sarajevo, which he was not allowed to leave. According to the State party, this measure was originally imposed with a view to establishing his identity and because he was considered a threat to the State party's security. Later this measure was justified with a view to ensuring his deportation and because he was still considered a threat. Finally, it was also extended in the light of the Committee's request for interim measures; the authorities' conclusion that he is a threat to the State party's security; and the fact that he did not have a residence permit in Bosnia and Herzegovina. In the State party's view, the continued detention of the author is reasonable and clearly justified for reasons of public interest, and the length of the measure cannot be attributed to the State party.

10.3 The Committee recalls that the notion of "arbitrariness" employed in article 9, paragraph 1, is not to be equated with "against the law", but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability, and due process of law.[7] Detention in the course of proceedings for the control of immigration is not arbitrary per se, but the detention must be justified as reasonable, necessary and proportionate in the light of the circumstances and reassessed as it extends in time. The decision must consider relevant factors case by case and take into account less invasive means of achieving the same ends, such as reporting obligations, sureties or other conditions to prevent absconding. Furthermore, it must be subject to periodic re-evaluation, and to judicial review in accordance with article 9, paragraph 4.[8] The Committee also recalls that article 9, paragraph 2, requires that anyone who is arrested be informed, at the time of arrest, of the reasons for the arrest, and that this requirement is not limited to arrest in connection with criminal charges.[9]

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[7] See communications Nos. 1134/2002, *Gorji-Dinka v. Cameroon*, Views adopted on 17 March 2005 para. 5.1; No. 305/1988, *Van Alphen v. Netherlands*, Views adopted on 23 July 1990, para. 5.8.

10.4 The Committee observes that the author has remained in custody since 2009. On 4 May 2009 the Intelligence and Security Agency informed the Service for Foreigners' Affairs that the author was considered a threat to the public order, peace and security of the State party. On the same day, the Service for Foreigners' Affairs arrested the author and placed him in the immigration centre in Sarajevo until 3 June 2009 on the grounds that he was considered a threat to the legal system, public order, peace and security of Bosnia and Herzegovina and of reasonable doubt regarding his real identity, pursuant to article 99, paragraph 2 (b) and (c), of the Law on Movement and Stay of Aliens and Asylum. On 8 May 2009, the Court of Bosnia and Herzegovina rejected the author's appeal against this measure. Subsequently, this measure and its prolongations have been also appealed by the author. However, the author was never provided with the reasons or evidence that led the authorities to the conclusion that he is a threat to national security or any specific explanation of why he could not receive any information on this subject. From the materials provided by the parties, the Committee concludes that the courts that reviewed the measures of his detention neither considered the adequacy of this assessment nor explained why they themselves could not be informed of the grounds on which such an assessment was based. Accordingly, the Committee considers that, while the initial arrest and detention may have been justified on the basis of information available to the State party, the latter has failed to justify the necessity of continued and prolonged detention since 2009 and to demonstrate that other, less intrusive, measures could not have achieved the same end. Accordingly, the Committee considers that the author's detention violated his rights under article 9, paragraph 1, of the Covenant.

10.5 With regard to the author's claims under article 9, paragraph 2, the Committee considers that one major purpose of requiring that all arrested persons be informed of the reasons for their arrest is to enable them to seek release if they believe that the reasons given are invalid or unfounded, and that the reasons must include not only the general basis of the arrest, but enough factual specifics to indicate the substance of the complaint.[10] In the circumstances, the Committee is of the view that the lack of information provided by the administrative authorities to the author when he was placed in the immigration centre in Sarajevo and to the courts on the reasons why he was considered a threat to the security undermined in practice his right to seek release before a court. Accordingly, the Committee concludes that by not providing information to the author on the reasons for his arrest, the State party violated his right under article 9, paragraph 2, of the Covenant.

10.6 The Committee considers that article 9, paragraph 4, of the Covenant requires that courts reviewing the lawfulness of detention must take into account all relevant factors necessary to assess the lawfulness of detention. The Committee concludes on the basis of the material in front of it that the courts had no access to the information leading the Intelligence and Security Agency to the conclusion that the author was considered a threat to the public order, peace and security of the State party and did not question the reasons why they themselves could not be informed of the grounds on which such assessment was based.[11] The Committee concludes that the review of the lawfulness of the detention by the courts of the State party was not commensurate with the standards of review required by article 9, paragraph 4, and thus violated this provision of the Covenant.

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[8] See communications Nos. 2094/2011, *F.K.A.G. et al. v. Australia*, Views adopted on 26 July 2013, para. 9.3, and No. 2136/2012, *M.M.M. et al. v. Australia*, Views adopted on 25 July 2013, para. 10.3.

[9] *F.K.A.G. et al. v. Australia*, para. 9.5 and *M.M.M. et al. v. Australia*, para. 10.5.

[10] See *F.K.A.G. et al. v. Australia*, para. 9.5, and *M.M.M. et al. v. Australia*, para. 10.3.

10.7 The Committee takes note of the author's claims under articles 17, 23 and 24 of the Covenant that his detention and possible deportation constitute an arbitrary and unlawful interference with his privacy and family life since it would entail splitting up his family, with a negative impact on the well-being of his children. His wife and minor children are nationals of Bosnia and Herzegovina, do not speak Arabic, and have no ties whatsoever to the Iraqi culture. Furthermore, they cannot follow him to a country facing a civil war with a deplorable security situation. The Committee also takes note of the State party's argument that the right to privacy and family life are not absolute rights and that they may be restricted for reasons of public interest.

10.8 The Committee recalls its jurisprudence according to which the separation of a person from his family by means of his expulsion constitutes an interference with the family life protected by article 17, paragraph 1, of the Covenant.[12] In cases where one part of a family must leave the territory of the State party while the other part would be entitled to remain, the relevant criteria for assessing whether or not the specific interference with family life amounts to arbitrary interference or can be objectively justified must be considered in the light of, on the one hand, the significance of the State party's reasons for the removal of the person concerned and, on the other, the degree of hardship the family and its members would encounter as a consequence of such removal.[13]

10.9 In the present case, the Committee observes that the removal of the author would impose considerable hardship on his family. If the author's wife and minor children were to decide to immigrate to Iraq in order to avoid a separation of the family, they would have to live in a country whose culture and language are unfamiliar. The Committee also observes that when deciding the removal of the author, the Court of Bosnia and Herzegovina and the Constitutional Court limited themselves to referring to the fact that the author was considered a threat to national security without properly assessing this reason for removal. Further, these courts failed to give the author an adequate opportunity to address the alleged security threat in a manner that would enable him to contribute to an appropriate assessment of the effects of his removal on his family situation. In the absence of a clear explanation from the State party as to why the author constitutes a threat to the security of the country or why this information cannot be transmitted, the Committee is of the view that the State party has failed to show that the interference with his family life is justified by serious and objective reasons. Accordingly, the Committee considers that under the circumstances the author's deportation would constitute a violation of articles 17 and 23 of the Covenant.

10.10 Having concluded that there has been a violation of the above provisions, the Committee decides not to examine separately the author's claims under article 24 of the Covenant.

11. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is therefore of the view that the State party violated the author's rights under articles 9, paragraphs 1, 2 and 4, and that the author's removal to his country of origin would constitute a violation of articles 17 and 23 of the Covenant.

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[11] See communication No. 1051/2002, *Ahani v. Canada*, Views adopted on 29 March 2004, paras. 10.2–10.3.

[12] See communication No. 558/1993, *Canepa v. Canada*, Views adopted on 3 April 1997, para. 11.4.

[13] See communication No. 1011/2001, *Madafferi v. Australia*, Views adopted on 26 July 2004, para. 9.8.

12. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including adequate compensation. It should either release the author on appropriate conditions or provide him with an adequate opportunity to challenge all grounds on which his detention is based. It should also undertake full reconsideration of the reasons for removing the author to Iraq, and the effects thereof on his family life, prior to any attempt to return the author to his country of origin. The State party is also under the obligation to take steps to prevent similar violations in the future.

13. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether or not there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to its Views. The State party is also requested to publish the present Views and to have them translated in the official language of the State party and widely distributed.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

FF. Communication No. 1960/2010, *Ory v. France* (Views adopted on 28 March 2014, 110th session)*

Submitted by:	Claude Ory (represented by counsel, Jérôme Weinhard)
Alleged victims:	The author
State party:	France
Date of communication:	1 April 2010 (initial submission)
Subject matter:	Conviction of a member of the Traveller community for lack of vehicle insurance and travel permit
Procedural issue:	Examination of the same matter under another international procedure; exhaustion of domestic remedies
Substantive issues:	Freedom of movement; discrimination and equal protection of the law
Articles of the Covenant:	12, paragraph 1, and 26
Article of the Optional Protocol:	5, paragraph 2 (a) and (b)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 28 March 2014,

Having concluded its consideration of communication No. 1960/2010, submitted to the Human Rights Committee by Claude Ory under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The author of the communication dated 1 April 2010 is Claude Ory, born on 1 December 1980 at Château-Gontier, France. He claims to be a victim of a violation by France of his rights under articles 12, paragraph 1, and 26 of the International Covenant on Civil and Political Rights. He is represented by counsel.

1.2 On 18 October 2010, the Special Rapporteur on new communications and interim measures decided that the admissibility of the communication should be considered jointly with the merits.

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* The following members of the Committee participated in the examination of the present communication: Mr. Yadh Ben Achour, Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Walter Kälin, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Gerald L. Neuman, Mr. Michael O'Flaherty, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabián Omar Salvioli, Mr. Marat Sarsembayev, Mr. Krister Thelin and Ms. Margo Waterval.

The facts as presented by the author

2.1 The author is a member of the Traveller community.[1] He lives in a caravan, in Le Mans (department of Sarthe), and is thus subject to Act No. 69-3 of 3 January 1969[2] and the associated Decree No. 70-708 of 31 July 1970, which require him to have a travel permit (*titre de circulation*) that must be stamped regularly by the authorities,[3] failing which he is liable to criminal sanctions.[4] In 2004, as he did not have a regular income, the author held a travel card (*carnet de circulation*), issued on 2 February 1998, that needed to be stamped by the police every three months and had last been stamped on 27 August 2003.

2.2 On 29 February 2004, while he was driving his truck to work, the author was checked by gendarmes in the commune of Mézeray (department of Sarthe). He was found to have neither vehicle insurance nor a stamp in his travel card. On 11 March 2006, when he was once again checked by gendarmes in Aubigné-Racan (Sarthe), he was informed of the consequences of the two offences committed on 29 February 2004. He was taken to the station and was questioned for four hours. He was informed that the La Flèche (Sarthe) police court had issued a judgement in absentia dated 23 November 2005, in which he had been ordered to pay a fine of 150 euros for not having a valid travel permit; he was also fined 300 euros and had his driving licence suspended for one month for not having insurance. The address on the court summons referred to his travel permit and his commune of registration. Thus, since the town hall of Arnage (Sarthe) was not his habitual residence and he did not receive his mail there, it had not been possible to inform him that the hearing was to be held, and he was therefore tried in absentia.

2.3 The author has no fixed abode or residence in France and lives in his vehicle on a permanent basis. He acknowledges that he had not had his travel booklet stamped by the administrative authority within the prescribed time limit. He filed an application to have the judgement in absentia of 23 November 2005 set aside, and the deputy prosecutor of Le Mans summoned him to a hearing at the La Flèche police court on 24 May 2006. He requested the assistance of counsel for his defence, which he was able to obtain through legal aid. After he requested a deferral, his case was finally heard on 27 September 2006. His defence lawyer asked for the case to be dismissed, citing Protocol 4 to the European Convention on Human Rights, which, in its article 2, provides that everyone who is lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his or her residence. On 20 December 2006, the court overruled the objection based on the assertion that the report noting the absence of a stamp was invalid, found the author guilty of that offence, and sentenced him to a fine of 100 euros (instead of the 150 euros initially set).

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[1] Administrative term designating the Roma community in France. The term was used in Act No. 69-3 of 1969 in place of the term "nomad", which had been used in the Act of 16 July 1912 concerning the exercise of itinerant trades and regulating the movement of nomads.

[2] Act No. 69-3 of 3 January 1969 on the exercise of itinerant activities and the regime applicable to persons travelling in France without a fixed abode or residence.

[3] Pursuant to article 4 of the Act of 3 January 1969, persons who have no fixed abode or residence, who live in a mobile shelter and have a regular income receive a travel booklet (*livret de circulation*), which must be stamped "at intervals not less than three months in length". Persons who have no regular income, on the other hand, are issued a travel card (*carnet de circulation*), which must be stamped every three months (art. 5).

[4] Article 20 of Decree No. 70-708 of 31 July 1970, implementing Title I and certain provisions of Title II of Act No. 69-3 of 3 January 1969, on the exercise of itinerant activities and the regime applicable to persons travelling in France who have no fixed abode or residence, provides that: "Persons who do not have their travel permit stamped within the time limits laid down in article 5 of the Act of 3 January 1969 or article 18, paragraph 2, of the present Decree shall be liable to the fine provided for category 5 minor offences."

2.4 On 28 December 2006, the author filed an appeal against that judgement with the Court of Appeal of Angers (Maine-et-Loire). He once again requested legal assistance, which was granted. During the proceedings, his lawyer argued that the offence in question constituted discrimination under article 14 of the European Convention on Human Rights, which prohibits discrimination. The author asserts, firstly, that persons who exercise itinerant activities or trades are exempted from the obligation to have a stamped travel card and, secondly, that the provisions apply exclusively to persons who dwell permanently in a vehicle, trailer or any other mobile shelter while other persons who have no fixed abode or residence, such as homeless persons or bargees, are exempted. The President of the Court of Appeal considered referring the case to the Court of Justice of the European Union for a preliminary ruling.[5] In the end, however, on 19 April 2007, he refused the appeal on the grounds that the author's situation was of his own choosing and made him subject to specific obligations that served the national public interest, which therefore were in no way discriminatory; he reduced the fine to 50 euros. The author lodged an appeal in cassation on 19 April 2007. His request for legal aid was refused on the basis of a lack of serious grounds. He was thus not able to retain counsel and his appeal was dismissed by the court of cassation on 4 March 2008.

2.5 On 22 December 2008, the author filed an application in respect of the same case with the European Court of Human Rights. On 1 September 2009, the Court declared the application inadmissible under article 35, paragraph 1, of the Convention, since more than six months had elapsed between the final decision at the national level (of the court of cassation) and the submission of the application.

The complaint

3.1 The author states, firstly, that he does not challenge the validity of the first charge (lack of vehicle insurance), but does contest the second, i.e., the failure to have a stamped travel card while having had no fixed abode or residence in France for more than six months, which falls within the scope of article 3 of the Act of 3 January 1969.

3.2 In respect of the infringement of the freedom of movement, the author notes that French law requires him to have a travel permit and to present it to law enforcement officials upon request, under penalty of criminal sanctions. He recalls that this is part of an old legal regime dating back to the nineteenth century; the modern travel permits are direct successors to the travelling performers' permits introduced pursuant to the circular of 6 January 1863 and then the "anthropomorphic nomad identity cards" introduced under the Act of 16 July 1912. Successive laws have maintained the principle of requiring travel cards. The author is thus subject to regular police checks, which, he asserts, are a clear infringement of his right to liberty of movement within his country, as provided for in article 12 of the Covenant. He rejects the conclusions of the Court of Appeal of Angers (see para. 2.4), observing that he has not chosen his way of life but is heir to a long family tradition, on both his father's and his mother's sides of the family, of living in a mobile shelter.[6] He adds that he was brought up in that way, that his brothers and sisters live the same way, that he has never lived in a house and that life on the road is the only way of life that he has ever known.

3.3 In respect of equality before the law, the author points out that, under French law, the domicile of any citizen, for the purpose of exercising his or her civil rights, is "the place of his or her main place of residence".[7] However, Travellers, who are subject to Act No. 69-3 of 3 January 1969, do not have a domicile and reside habitually in a land-based mobile shelter. Rather than mentioning a domicile, the specific legal regime applicable in this case requires that persons register with a commune for administrative purposes; they are not free to choose or to change that commune, contrary to the rights provided for by articles 103 et seq. of the Civil Code, on change of domicile. The author submits that he does not have the same civil rights as citizens who have a fixed residence.

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[5] There is a procedure under which national courts may request the Court of Justice of the European Union for its interpretation or view on the validity of European law in the context of a case before it.

[6] The author encloses a copy of his family tree.

3.4 According to the author, the unfavourable treatment of persons subject to the stamp system constitutes legally sanctioned internal and external discrimination. It is legally sanctioned because it is laid down by the law. It is internal because, of those required to hold the travel permits provided for by Act No. 69-3, persons who practise itinerant activities or trades are not subject to the stamp system. Other persons of no fixed abode, such as those living in houseboats (bargees) or on the street, are not subject to the administrative requirement to have a travel permit either. The author argues that the discrimination is also external because the vast majority of the population, who live in fixed residences as defined in article 2 of Decree 70-708 of 31 July 1970 and therefore have a domicile, have not been required to have these "passports" for the last century. The stamp system, and the travel permit system in general, thus, according to the author, infringe the freedom to come and go within a State only of those persons who are subject to them. This constitutes both internal and external discrimination against them and gives rise to inequality of rights in respect of the concept of a domicile. Accordingly, the author requests moral and material compensation, as well as to have his conviction expunged from his police record. He demands to be placed on an equal footing with all his fellow-citizens, i.e., to be able to maintain his way of life and have the right to have a domicile as provided for in the Civil Code, as well as the freedom to change and to choose that domicile, without being obliged to have and to present a travel permit on pain of being found guilty of an offence.

State party's observations on admissibility

4. On 29 September 2010, the State party submitted its observations on admissibility, arguing that the communication should be declared partially inadmissible for non-exhaustion of domestic remedies. According to the State party, the author has argued before the Committee that he does not have the freedom to choose or to change his place of residence. However, before the national courts, the contentious proceedings dealt only with the lack of a stamp in his travel card. This is the only offence for which domestic remedies have been exhausted. In this respect, the State party is of the view that the matters described in the communication concerning the choice of commune of registration are completely unrelated to the issue considered by the national courts and are thus inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

State party's observations on the merits

5.1 On 28 January 2011, the State party submitted its observations on the merits of the communication. It again argues that the author's allegations concerning the choice of his commune of residence were not raised in the national courts. Furthermore, according to the State party, the author cites only the provisions of the French Civil Code regarding the commune of registration, without specifying which provisions of the Covenant have allegedly been breached. Accordingly, this part of the communication should be considered inadmissible.

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[7] Civil Code, art. 102.

On the freedom to choose and to change the commune of registration

5.2 On the merits, the State party begins by addressing the question of freedom of choice and of a commune of registration. It recalls that the habitual residence of the persons covered by Act No. 69-3 of 3 January 1969 is, by definition, a mobile residence: "a vehicle, trailer, or any other mobile shelter", according to article 3 of the Act. To ensure that persons who have such a residence can enjoy and exercise their civil and political rights and fulfil their duties, legislators developed the system of a commune of registration to allow such persons to maintain a link with the administrative authorities. According to the State party, this address is used purely for administrative purposes and does not constitute a residence within the meaning of article 12 of the Covenant. The permanent residence of such persons is their trailer or other mobile shelter, and their place of residence is where that mobile shelter is at any given time. The right to free choice of residence, protected under article 12 of the Covenant, therefore applies only to the author's permanent residence, which is by nature mobile.

5.3 The State party adds that, contrary to the author's claims, a person travelling in France who has no fixed abode or residence can choose the commune in which he or she wishes to be registered for administrative purposes, but must provide a valid reason for that choice (family ties, for example). The prefect may not overrule that choice except for serious reasons, related, in particular, to public order, and must issue an explicitly substantiated decision in such cases.[8] In consequence, according to the State party, the restrictions that are placed on the right to freely choose one's commune of registration are extremely limited and are in compliance with article 12, paragraph 3, of the Covenant, which provides that this right may be subject to restrictions when these are "provided by law, are necessary to protect national security, public order, public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant".

5.4 As regards article 26 of the Covenant, which the author invokes, the State party argues that article 7 of the Act of 3 January 1969 provides that "any person who requests the issuance of a travel permit (...) is required to make known the commune in which he or she wishes to be registered". The choice of commune of registration thus applies to any person over the age of 16 who has not had a fixed residence for more than six months, if he or she dwells permanently in a vehicle, trailer or any other mobile shelter (art. 3). Referring to the Committee's general comment No. 18 (1989), on non-discrimination,[9] the State party also adds that registration with a commune enables a person travelling in France who has no fixed abode or residence to effectively enjoy and exercise his or her civil and political rights, including the right to vote. The Committee has indicated that the enjoyment of rights and freedoms on an equal footing does not mean identical treatment in every instance.[10] The establishment of a specific legal regime for persons travelling who have no fixed abode or residence does indeed take account of the specific characteristics of their situation. In any event, it cannot, according to the State party, be argued that the author and all other persons in his situation are, as he contends, deprived of their right to have a domicile, as guaranteed by French civil law. There is no legal obstacle that would prevent a person living in a mobile residence from changing his or her way of life and choosing a domicile within the meaning of article 102 of the Civil Code. However, in the context of an itinerant way of life, registration with a commune provides a means of exercising one's rights and does not entail any discrimination.

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[8] Article 23 of Decree No. 70-708 of 31 July 1970 (see note 3 above).

[9] *Official Records of the General Assembly, Forty-fifth Session, Supplement No. 40*, vol. I (A/45/40 (Vol. I)), annex VI, sect. A, para. 7.

[10] Idem, para. 8.

The travel card

5.5 As regards the matter of the travel permit and the obligation to have it stamped, which the author considers a clear infringement of his right to liberty of movement within the country, the State party recognizes that the constraints entailed by this requirement constitute a restriction within the meaning of article 12, paragraph 3, of the Covenant, but contends that the restriction is laid down by law and is justified for reasons of public order. According to the State party, the fact that persons of no fixed abode who do not show proof of a regular income have an obligation to have their travel card stamped at regular intervals is the counterpart of their recognized right to change their place of residence every day, if they so wish. This requirement allows the administrative authorities to maintain a link with them and makes it possible for the authorities to contact them, as well as, where necessary, to conduct checks under conditions that take account of their itinerant way of life.

5.6 Considering the travel permit requirement in the light of article 26 of the Covenant, the State party argues that the obligation to have the permit stamped is not restricted to a specific community, but applies to all persons over the age of 16 who have not had a fixed abode or residence for more than six months if they dwell permanently in a vehicle, trailer or any other mobile shelter (Act of 3 January 1969, art. 3). Thus, any person who chooses to adopt an itinerant way of life, as defined above, must have a travel permit, which must be stamped by the administrative authorities at regular intervals. Accordingly, fairground workers and caravaniers (employees working on large building sites) are also required to have travel permits. The State party adds that, contrary to the author's claims, the itinerant way of life is, from a legal point of view, indeed the choice of the person concerned, a choice which is respected by the public authorities.

5.7 In conclusion, the State party reiterates that the specific regime applicable to the author and to other people in the same situation is a consequence of their high level of mobility, as compared to persons who have adopted a sedentary lifestyle. The difference in treatment is therefore objectively justified by the difference between their situations. Finally, the State party adds that the author's claims concerning the travel permit do not reflect the unanimous position of all Travellers, because some members of that community felt that these documents were highly valuable as identity papers.

Authors' comments on the State party's observations on the merits

6.1 The author responded to the State party's observations on the merits on 4 April 2011.

On the claim in relation to article 12

6.2 The author does not dispute the fact that the requirement to register with a commune does not contravene the principle of the freedom of choice of residence, guaranteed under article 12. He specifies that it is the principle of freedom of movement that he wishes to assert. The author notes that a French citizen who has a fixed residence is not obliged to possess an administrative document in order to move about the country. In addition, other persons of no fixed residence, such as bargees and homeless persons, are not obliged to have a special administrative document either. People considered to be "travelling" are the only ones who are invariably subject to this system, under the Act of 3 January 1969. According to the author, the simple possession of such a permit, which for some has become a symbol of their identity, would not be so serious if failure to have the permit did not make a person liable to criminal penalties, including fines and terms of imprisonment, if such a person is found to be travelling without a permit or without proof of the possession of the permit. In addition, the obligation to have the travel card stamped by the police at regular intervals, on pain of criminal penalties, constitutes a serious infringement of the freedom of movement.

6.3 The system also makes it possible, each time the permit holder requests a stamp, for the authorities to check the wanted-persons file, which includes those persons wanted on administrative and judicial grounds.[11] The author adds that the system of travel permits makes it possible for the police to maintain a special file on persons of no fixed abode or residence. That file currently comprises more than 200,000 records.[12] The National Commission for Information Technology and Civil Liberties, as well as other interested persons, has drawn attention to the existence of undeclared databases and messages linked to the file on persons of no fixed abode or residence. This case has also given an opportunity to disseminate a confidential internal gendarmerie document dating from 1992, entitled *La criminalité de certaines minorités ethniques non sédentarisées* (criminality among certain non-sedentary ethnic minorities). According to the author, this terminology clearly refers to Travellers. The document states that almost a third of the 120,000 individuals whose names figure in the administrative file of persons of no fixed abode or residence are known offenders. It also notes that "it is up to staff, in particular, to make a clear distinction between individuals classified as persons of no fixed abode or residence, who can be required to produce their administrative documents ... without following any particular procedure and persons who are settled, whose identity documents are checked within the legal framework defined by articles 78-1 to 78-5 of the Code of Criminal Procedure". According to the author, such guidelines provide clear evidence of the specific and discriminatory nature of travel permit checks. The checks involve the use of police intelligence related specifically to the Traveller population, described as a "non-settled ethnic minority", who are subject to specific, systematic and stigmatizing checks made possible by the travel permit system.

On the claim in relation to article 26

6.4 The author again asserts that the Travellers' way of life should be analysed from a sociological standpoint that takes into account the cultural capital handed down from generation to generation and goes beyond a legal analysis of individual "choice". Although living in a fixed structure is the norm today, this mode of life should not be imposed on persons who have never experienced it. The author recalls that he has never known anything other than the Travellers' way of life and that his family — going back as far as his great-grandparents — has led an itinerant way of life and practised itinerant trades. He adds that, beyond the restriction that they place on the freedom of movement, travel permits are also just one of the ways in which Travellers are treated differently from the rest of the population. Although the justification given is the mobility of this population group, it appears that other mobile populations, such as bargees, travelling salespeople and homeless persons, are not subject to the same types of checks. Furthermore, the way that Travellers are defined is related not to their mobility, but to the fact that they have been dwelling in mobile shelters for at least six months.[13] However, the lack of a fixed residence, cited by the State party as justification for the specific treatment of Travellers, is also common to bargees, nomads and fairground workers. These people used to be considered to be on an equal footing, under Ordinance No. 58-923 of 7 October 1958,[14] which gave these three categories of persons the possibility of freely choosing their domicile and which had modified the Civil Code in order to do so. Although the provision relating to domiciles was maintained in the case of bargees, it was abrogated in the case of nomads and fairground workers (terms replaced in recent legislation by the category of "Travellers") by the Act of 3 January 1969, which introduced the concept of the commune of registration for these two categories. The author adds that the bill relating to the aforementioned Act shows that the introduction, in article 8 of the Act, of a quota whereby Travellers registered with a municipality could account for no more than 3 per cent of the local population was intended to ensure that the electoral situation in the municipalities concerned would not be significantly changed by any influx of voters without actual ties to the commune. According to the author, the fact that an effort was made to decrease the effective electoral representation of this sector of the population demonstrates the inequality before the law of which Travellers are victim.

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[11] Decree of 15 May 1996 concerning the wanted persons file, maintained by the Ministry of the Interior and the Ministry of Defence.

[12] The author explains that this file, which was created under the terms set out in a decree of 22 March 1994, is managed by the national gendarmerie. It is used for the computerized processing and monitoring of travel permits. Since 2005, it has included digital photographs of permit holders. The file may be consulted by law enforcement officials (police and gendarmerie), the prefectural services, and authorized third parties (treasury departments and health, judicial and military authorities).

[13] Act of 3 January 1969, art. 3.

[14] The author adds that the 1958 Ordinance was never implemented for practical reasons.

Issues and proceedings before the Committee

Consideration of admissibility

7.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether the communication is admissible under the Optional Protocol to the Covenant.

7.2 In accordance with article 5, paragraph 2 (a), of the Optional Protocol, the Committee has ascertained that a similar complaint filed by the author (complaint No. 3257/09) was found inadmissible by the European Court of Human Rights on 1 September 2009 under article 35, paragraph 1, of the European Convention on Human Rights, since the period between the final decision at the national level (of the court of cassation) and the submission of the application was more than six months. The Committee also recalls that, upon its acceptance of the Optional Protocol, the State party entered a reservation to article 5, paragraph 2 (a), of the Protocol specifying that the Committee "shall not have competence to consider a communication from an individual if the same matter is being examined or has already been considered under another procedure of international investigation or settlement". The Committee notes, however, that the European Court of Human Rights has not "examined" the case in the sense of article 5, paragraph 2 (a), of the Optional Protocol, inasmuch as its decision pertained only to an issue of procedure.[15] Article 5, paragraph 2 (a), of the Optional Protocol, as modified by the State party's reservation, therefore does not represent an impediment to the examination of the communication by the Committee.

7.3 The Committee has also noted the State party's argument that the author has not exhausted domestic remedies with regard to the issue of the choice and change of domicile under the system of registration introduced by the Act of 3 January 1969 (art. 7 et seq.). The Committee observes that the author does not contest this argument and that he has also specified that, of the safeguards set forth in article 12, paragraph 1, he wishes to assert only the right to liberty of movement. Accordingly, the Committee declares the part of the communication relating to choice and change of domicile inadmissible under article 5, paragraph 2 (b), of the Optional Protocol.

7.4 The Committee considers that all other criteria for admissibility have been met and declares the communication admissible in respect of the arguments put forward by the author under articles 12, paragraph 1 (in respect of liberty of movement), and 26 of the Covenant.

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[15] See communications No. 1505/2006, *Vincent v. France*, inadmissibility decision of 31 October 2007, para. 7.2; No. 1389/2005, *Bertelli Gálvez v. Spain*, inadmissibility decision of 25 July 2005, para. 4.3; and No. 1446/2006, *Wdowiak v. Poland*, inadmissibility decision of 31 October 2006, para. 6.2.

Consideration of the merits

8.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as required under article 5, paragraph 1, of the Optional Protocol.

8.2 The Committee notes the author's claim that, by fining him 150 euros for the criminal offence (reduced by the Court of Appeal of Angers to a fine of 50 euros) of lacking a valid stamp on his travel permit, the State party allegedly acted in violation of its obligations to guarantee him: (1) the right, under article 12, paragraph 1, of the Covenant to move about freely within the territory of the State party; and (2) his right, under article 26 of the Covenant, to equality before the law and equal protection of the law, without discrimination. The Committee notes the State party's argument that the restrictions imposed on the application of article 12 by Act No. 69-3 of 3 January 1969 are consistent with paragraph 3 of that article because they are justified by reasons of public order. In particular, it asserts that the requirement to have a stamped travel permit permits the maintenance of an administrative link with members of the itinerant population and to carry out checks as necessary.

8.3 The Committee recalls its general comment No. 27 (1999) on freedom of movement, in which it states that the limitations that may be imposed on the rights protected under article 12 must not nullify the principle of liberty of movement, and are governed by the requirement of necessity provided for in article 12, paragraph 3, and by the need for consistency with the other rights recognized in the Covenant.[16] Article 5 of Act No. 69-3 of 3 January 1969, which was applicable to the author at the time of the events in question, required persons who had had no fixed abode or residence for more than six months, who were living in a mobile shelter and had no regular income to have a travel card which had to be stamped every three months in order for them to be able to travel in France. Article 20 of Decree No. 70-708 of 31 July 1970 also provides that, in the event of failure to obtain such a stamp within the prescribed period, the person concerned will be liable to a fine corresponding to a category 5 minor offence.[17] This provision clearly places a restriction on the exercise of the right to liberty of movement by the persons in question (art. 12, para. 1). The Committee must therefore determine whether such a restriction is authorized by article 12, paragraph 3, of the Covenant.

8.4 It is not disputed that an obligation to have a travel permit and to have it stamped at regular intervals by the authorities is established under the Act. The Committee takes note of the State party's statement that the objective of these measures is to help to maintain public order. It is therefore incumbent upon the Committee to assess whether this restriction is necessary and proportionate to the aim pursued.[18] The Committee recognizes the State party's need to check, for the purposes of maintaining security and public order, that persons who regularly change their place of residence are and remain identifiable and contactable.

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[16] See general comment No. 27 (1999), *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 40*, vol. I (A/55/40 (Vol. I)), annex VI, sect. A, para. 2.

[17] See note 4 above. Article 131-13 of the Criminal Code provides that category 5 minor offences are punishable by a fine of a maximum of 1,500 euros; this amount may be increased to 3,000 euros in the case of a repeat offence.

[18] General comment No. 27, para. 14.

8.5 The Committee observes, however, that the State party has not demonstrated that the obligation to have the travel card stamped at frequent intervals or to make failure to fulfil that obligation subject to criminal charges (Decree No. 70-708 of 31 July 1970, art. 20) are measures that are necessary and proportionate to the end that is sought. The Committee concludes that this restriction of the author's right to liberty of movement is not compatible with the conditions set forth in article 12, paragraph 3, and consequently constitutes a violation of article 12, paragraph 1, in his regard.

8.6 In the light of its finding in respect of article 12, paragraph 1, the Committee will not consider separately the claims based on the violation of article 26 of the Convention.

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of article 12, paragraph 1, of the Covenant.

10. Pursuant to article 2, paragraph 3 (a), of the Covenant, the State party is required to provide the author with an effective remedy by, inter alia, expunging his criminal record and providing him with adequate compensation for the harm suffered, and to review the relevant legislation and its application in practice, taking into account its obligations under the Covenant. The State party is also under an obligation to take measures to prevent similar violations in the future.

11. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether or not there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure for all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when a violation has been established, the Committee wishes to receive information from the State party, within 180 days, concerning the measures taken to give effect to the Committee's Views. The State party is also invited to publish the present Views.

[Adopted in English, French and Spanish, the French text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian, as part of the present report.]

Appendix

Individual opinion of Mr. Fabián Omar Salvioli (concurring)

1. I agree with the Committee's decision in the case of *Ory v. France* (communication No. 1960/2010), in which it found a violation by the State party of article 12 of the International Covenant on Civil and Political Rights with respect to the victim.

2. However, I regret that in its decision the Committee did not find it necessary to explore the author's serious claims[a] concerning the violation of article 26 of the Covenant.[b] The Committee has remained silent on two key human rights issues, namely equality before the law and non-discrimination, which lie at the heart of the communication.

3. In this case, it has been sufficiently substantiated that there is discrimination against a specific group of individuals (namely, members of the "Traveller communities"), many of whom — including the author — are of French nationality. For administrative and legal purposes, the "commune of registration" is sufficient for the State's purposes (namely, the need to maintain a link with the administrative authorities). However, the State has been unable to show or justify an additional need for members of the "Traveller communities" to have a travel card stamped on a regular basis.

4. In its response to the communication, the State cites as reasons for the travel permit requirement the need to maintain a link between the State and members of Traveller communities and to carry out "checks".[c]

5. Regarding the first of the State's reasons, such a link is perfectly well maintained by requiring members of the Traveller communities to register with a commune as provided for in article 7 of Act No. 69-3.[d]

6. As for the need to make "checks", the State's arguments are far too general, and it gives no reasonable explanation as to why these persons must be subject to special checks.

7. The Committee has previously defined the parameters of the principles of equality and non-discrimination by stating that a rule or measure that is apparently neutral or lacking any intention to discriminate can have a discriminatory effect resulting in a violation of article 26 if the detrimental effects of the rule or decision exclusively or disproportionately affect persons of a particular race, colour, sex, language, religion, political or other opinion, national or social origin, financial status, birth or other status. However, rules or decisions with such an impact do not amount to discrimination if they are based on objective and reasonable grounds.[e]

8. In special situations States may adopt differentiated measures, but these must pursue a legitimate aim, be provided for by law and, above all, be reasonable and proportionate. In this case, the requirement for members of the "Traveller communities" to have their travel permits stamped regularly does not meet the tests of reasonableness, necessity and proportionality. Consequently, the Committee should have concluded that article 26 of the

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[a] As set out in the Committee's Views, paras. 3.3 and 3.4, and later in para. 6.4.

[b] The Committee's Views, para. 8.6.

[c] See the Committee's Views, para. 5.5.

[d] No changes were made to the "commune of registration" system in the recent revision of the Act.

[e] General comment No. 18 on article 26, HRI/GEN/1/Rev.9 (Vol. I), 10 November 1989; see also communication No. 1474/2006, *Prince v. South Africa*, Views adopted on 31 October 2007, para. 7.5, and communication No. 998/2001, *Althammer et al. v. Austria*, Views adopted on 8 August 2003, para. 10.2.

Covenant was also violated with respect to the author of the communication, and the State should take this into account when providing redress, including by abolishing the stamp requirement so as to ensure that such violations are not repeated.

[Adopted in English, French and Spanish, the Spanish text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

GG. Communication No. 1997/2010, *Rizvanović v. Bosnia and Herzegovina* (Views adopted on 21 March 2014, 110th session)*

Submitted by:	Fatima Rizvanović and Ruvejda Rizvanović (represented by counsel, Track Impunity Always (TRIAL))
Alleged victims:	The authors and their missing relative, Mensud Rizvanović
State party:	Bosnia and Herzegovina
Date of communication:	15 September 2010 (initial submission)
Subject matter:	Enforced disappearance and effective remedy
Procedural issue:	Insufficient substantiation
Substantive issues:	Right to life, prohibition of torture and other ill-treatment, liberty and security of person, right to be treated with humanity and dignity, recognition of legal personality, right to an effective remedy
Articles of the Covenant:	6, 9, 10 and 16, read in conjunction with art. 2, para. 3; 7, read alone and in conjunction with art. 2, para. 3; 26 and 2, para. 1
Article of the Optional Protocol:	-

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 21 March 2014,

Having concluded its consideration of communication No. 1997/2010, submitted to the Human Rights Committee by Fatima Rizvanović and Ruvejda Rizvanović under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the authors of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The authors of the communication are Fatima Rizvanović, a Bosnian national born 28 August 1929, and Ruvejda Rizvanović, a Bosnian national born 18 August 1952. They submit the communication on their own behalf and on behalf of Mensud Rizvanović (son of

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* The following Committee members participated in the examination of the present communication: Mr. Yadh Ben Achour, Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Walter Kälin, Ms. Zonke Zanele Majodina, Mr. Gerald L. Neuman, Sir Nigel Rodley, Mr. Victor Manuel Rodríguez-Rescia, Mr. Fabián Omar Salvioli, Ms. Anja Seibert-Fohr, Mr. Yuval Shany, Mr. Konstantine Vardzelashvili, Ms. Margo Waterval and Mr. Andrei Paul Zlătescu.

An individual opinion by Committee member Gerald L Neuman, joined by Committee member Anja Seibert-Fohr (concurring) is appended to the present views.

Fatima Rizvanović, and husband of Ruvejda Rizvanović), who is the victim of enforced disappearance that took place in July 1992, and whose fate and whereabouts remain unknown. At the time of the events that led to his enforced disappearance, Mensud Rizvanović resided and worked as a postman in Rizvanovići. He is the father of two children. The authors claim a violation of articles 6, 7, 9, 10 and 16, in conjunction with article 2, paragraph 3 of the International Covenant on Civil and Political Rights in respect to Mensud Rizvanović. They further allege that they are themselves victims of a violation by Bosnia and Herzegovina[1] (hereinafter BiH) of article 7, read alone and in conjunction with article 2, paragraph 3, and of articles 2, paragraph 1, and 26 of the Covenant. The authors are represented by the organization TRIAL (Track Impunity Always).

The facts as submitted by the authors

2.1 After its declaration of independence in March 1992, an armed conflict broke out in Bosnia and Herzegovina. The key local parties to the conflict were *Armija Republike Bosne i Hercegovine* (ARBiH), mostly made up of Bosniacs[2] and loyal to the central authorities, *Vojska Republike Srpske* (VRS) and *Hrvatsko vijeće obrane*, mostly made up of Croats.[3]

2.2 On 20 July 1992, members of the VRS forces and paramilitary groups surrounded the village of Rizvanovići and apprehended many civilians, including Mensud Rizvanović who was in his house with his wife and children. This event took place in the general context of the "ethnic cleansing operations" that were perpetrated in the area. According to eyewitnesses, Mensud Rizvanović was taken to the school in Rizvanovići, together with other men. From there, they were taken to the Keraterm concentration camp. Reportedly, Mensud Rizvanović and the other men were living in inhumane conditions at the Keraterm camp, and were frequently beaten and ill-treated. Mensud Rizvanović was last seen alive, by eyewitnesses, in life-threatening circumstances in the hands of the guards of the facility, who were allegedly taking him and other men to an unknown location to perform forced labour.[4] The fate and whereabouts of Mensud Rizvanović remain unknown.

2.3 The armed conflict came to an end in December 1995 when the General Framework Agreement for Peace in Bosnia and Herzegovina (hereinafter "the Dayton Agreement") entered into force.[5]

2.4 More than 18 years after the disappearance of Mensud Rizvanović, no *ex officio*, prompt, impartial, thorough, independent and effective investigation has been carried out by the BiH authorities. Notwithstanding the existence of evidence that those responsible for the apprehension and the enforced disappearance of Mensud Rizvanović were members of the VRS army, no one has been summoned, indicted or convicted for these crimes, thus fostering an ongoing climate of impunity.

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[1] Bosnia and Herzegovina (BiH) is a party to the International Covenant on Civil and Political Rights (on 1 September 1993, BiH succeeded the former Yugoslavia, which had ratified the treaty on 2 June 1971), as well as to the First Optional Protocol to the Covenant, which entered into force for BiH on 1 June 1995.

[2] Bosniacs were known as Muslims until the 1992–1995 war. The term "Bosniacs" (*Bošnjaci*) should not be confused with the term "Bosnians" (*Bosanci*), which is commonly used to denote citizens of Bosnia and Herzegovina irrespective of their ethnic origin.

[3] After the 1992–1995 war, ARBiH, VRS and *Hrvatsko vijeće obrane* gradually merged into the Armed Forces of Bosnia and Herzegovina.

[4] The eyewitness to those events was Midhad Duratović, who was taken to Keraterm camp together with Mensud Rizvanović, and with whom he shared a room in the detention facility. The information was confirmed in 2000 by Ibrahim Alagić, Mensud Rizvanović's nephew, who had been apprehended together with him.

[5] In accordance with the Dayton Agreement, Bosnia and Herzegovina consists of two entities: the Federation of Bosnia and Herzegovina and the Republika Srpska. The Dayton Agreement failed to resolve the Inter-Entity Boundary Line in the Brčko area, but the parties agreed to a binding arbitration in this regard under the rules of the United Nations Commission on International Trade Law (UNCITRAL). The Brčko District, under the exclusive sovereignty of the State and international supervision, was formally inaugurated on 8 March 2000.

2.5 Four days after the apprehension of her husband, Ruvejda Rizvanović and her children were taken by VRS soldiers to the concentration camp in Trnopolje, and then to Travnik, where they remained for two weeks. From there, they reached Posusje. On 25 August 1992, the brother-in-law of Ruvejda Rizvanović took her and her children to Sierning, Austria. Throughout this period, Ruvejda Rizvanović had no information as to what had happened to Fatima Rizvanović. They finally met again in Sierning.[6]

2.6 Together, Fatima and Ruvejda Rizvanović initiated proceedings to look for Mensud Rizvanović. They reported his enforced disappearance to the municipality of Sierning;[7] they visited the Sierning office of the Red Cross monthly; sent letters and tracing requests through the Austrian Red Cross and the Office for Banned Persons and Refugees in Zagreb; sent information to the International Committee of the Red Cross (ICRC) headquarters and to a Bosnian magazine that is diffused among the Bosnian diaspora.[8] Upon their return to Rizvanovići,[9] the authors reported the enforced disappearance of Mensud Rizvanović to international organizations present in BiH (namely, the International Commission on Missing People and the ICRC) and to entities dealing with missing persons (such as the Australian Red Cross, the Federation Commission on Missing People, the Missing People Institute, the Republika Srpska Operative Team for Tracing Missing Persons). Fatima and Mensud Rizvanović's children also gave DNA samples to the ICRC to facilitate potential identification of remains. Mensud Rizvanović is still registered as "person unaccounted for" in the ICRC database.

2.7 On 26 November 2003, Ruvejda Rizvanović obtained a decision from the Municipal Court in Prijedor declaring Mensud Rizvanović dead as of 22 November 1996, the "first day after the passing of one year since the end of the hostilities". The authors state that they were extremely reluctant to avail themselves of the decision without knowing with certainty the fate and whereabouts of Mensud Rizvanović; but it was necessary for them to have access to a monthly pension, and the Municipal Courts awarded a social allowance to relatives of missing persons only on the presentation of a death certificate. The authors consider that that painful procedure amounts to treating "enforced disappearance" as a "direct death", while there is no certainty as to the fate and whereabouts of the disappeared person. In February 2009, the Administrative Service, Department for Veterans and Protection of the Disabled in Prijedor issued a decision granting both authors the right to obtain a monthly pension[10] as of 1 October 2007. That pension is a form of social assistance and cannot be considered as an adequate measure of reparation for the violations suffered.

2.8 In May 2006, Fatima Rizvanović submitted an application to the Human Rights Commission of the BiH Constitutional Court. The Court joined it to the applications of other members of the Izvor Association of Relatives of Missing People. On 16 July 2007, the Constitutional Court adopted a decision, concluding that the applicants of that collective action were relieved of the requirement of exhausting domestic remedies before ordinary courts, as "no specialized institution on enforced disappearance in BiH seems to be operating effectively".[11] The Court further found a violation of articles 3 and 8 of the European Convention on Human Rights, due to lack of information on the fate of the disappeared relatives of the applicants, including Mensud Rizvanović. The Court ordered the BiH authorities concerned to provide "all accessible and available information on members of the applicants' families who went missing during the war, […] urgently and without further delay and no later than 30 days from the date of the receipt of the decision". The Constitutional Court did not adopt any decision on the issue of compensation, considering that it was covered by the provisions in the Law on Missing Persons concerning financial support and by the establishment of the Fund for Support to the Families of Missing Persons. The authors argue, however, that the said provisions on financial support have not been implemented and that the Fund has still not been established.

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[6] No information is provided as to exactly when Ruvejda Rizvanović and Fatima Rizvanović were able to meet again in Sierning.

[7] Fatima Rizvanović did not obtain written evidence of her report.

[8] *The Golden Lily* had a section on missing persons. Following that publication, Ruvejda Rizvanović received a letter from the International Islamic Institute alleging that her husband had been slaughtered by the Ustasha. There is no information enabling confirmation of this allegation.

[9] No information is provided as to the date of their return to BiH.

[10] Fatima Rizvanovic was granted a monthly pension of 70 KM (approximately 35 EUR) per month.

2.9 In March 2008, Fatima Rizvanović received a letter dated 27 December 2007 from the Republika Sprska Government Office for Tracing Detained and Missing Persons, informing her that Mensud Rizvanović had been registered as a missing person with the ICRC and the Federation Commission for Missing Persons, and that the Republika Srpska Government Office for Tracing Detained and Missing Persons was committed to resolving the issue of missing persons as soon as possible. That was the last letter that Fatima Rizvanović received from the "concerned authorities" in the context of the implementation of the Constitutional Court decision. The time limit set by the Constitutional Court decision of 16 July 2007 expired and no relevant information on the fate and whereabouts of Mensud Rizvanović was provided to the Court or to the authors.

2.10 On 13 May 2009, Fatima Rizvanović filed a request for compensation under the Law on the Right to Compensation for Pecuniary and non-Pecuniary Damage, caused by War Activities during the Period from 20 May 1992 to 19 June 1996. On 23 September 2010, the State Attorney's Office of the Republika Srpska[12] rejected her request, arguing that it did not have the competence to decide on her claim, which did not refer to damage suffered in connection with the conduct of military service and military defence activities. On 28 September 2010, Fatima Rizvanović appealed that decision before the Ministry of Justice of the Republika Srpska. No decision had been adopted at the time of submission of the present complaint.

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[11] Principle on admissibility stated in Constitutional Court of BiH, *M.H. and others*, case No. AP-129/04, judgement of 27 May 2005, paras. 37–40, referred to in the judgement for the case of Mensud Rizvanović: *Jele Stjepanović and others*, case No. AP 36/06, judgement of 16 July 2007.

[12] On 21 September 2010, TRIAL requested clarification on the functioning of the procedure established by the Law on the Right to a Compensation for Pecuniary and non-Pecuniary Damage, caused by the War Activities in the Period from 20 May 1992 to 19 June 1996. On 27 September 2010, the State Attorney's Office of the Republika Srpska sent an official answer, stating that the amended provisions extending the deadline for submitting applications are "connected to articles 15 and 16 (war disabled persons and families of killed and disappeared soldiers) of the basic law and thus they do not encompass civilian victims of war who can realize their right entirely through judicial institutions under the condition that they have filed requests to regular courts." Since, from the reading of the Law on the Right to Compensation for Pecuniary and non-Pecuniary Damages and its subsequent amendments, it does not result that civilians are excluded from the right to receive compensation nor that they have to follow a procedure different from that applied to veterans, TRIAL again contacted the State Attorney's Office of the Republika Srpska. On that occasion, the representative of the State Attorney's Office admitted that civilians were not expressly excluded from the enjoyment of compensation by the text of the law, but that according to their interpretation of the law, only members of the VRS were entitled to compensation. The author submits that the interpretation of the law is clearly discriminatory and not grounded in any legal provision.

2.11 On 19 July 2010, Fatima Rizvanović sent another letter to the Republika Srpska Operative Team for Missing Persons, seeking additional information about the measures undertaken to implement the Constitutional Court's decision of 16 July 2007. On 23 July 2010, she received a reply stating that it was the responsibility of the Missing Persons Institute to provide information. On 13 April 2011, she contacted the BiH Constitutional Court and pointing out the failure to implement the decision of 16 July 2007 and requesting the Court to adopt a ruling under article 74.6 of its Rules of Procedure.[13] At the time of submission of the communication to the Committee, the Court had not replied.

2.12 On 16 September 2010, Fatima Rizvanović received a letter from the Missing Persons Institute, informing her that, so far, it had been impossible to establish the fate of Mensud Rizvanović, that a request for the exhumation of a number of mass graves on the territory of Prijedor municipality had been processed by the Prosecutor's Office of BiH and that a court order was expected. The Institute finally indicated that, upon receipt of a DNA analysis corresponding to the preliminary identity of her son, they would inform her about the process of final identification and deliver the mortal remains of Mensud Rizvanović for burial.

2.13 The authors refer to the findings of the Constitutional Court, according to which, currently, "referral to ordinary courts of BiH would yield no result" and that no specialized institution on missing persons in BiH operates effectively. Accordingly, the Constitutional Court considered that Fatima Rizvanović and the other applicants "did not have at their disposal an effective and adequate remedy to protect their rights". In compliance with article VI (4) of the BiH Constitution, the ruling of 16 July 2007 must be considered final and binding, and the authors do not have any other effective remedy to exhaust. As to the competence *ratione temporis* of the Committee, the authors refer to the jurisprudence of national and international jurisdictions and human rights mechanisms, as well as to the provisions of international treaties stating the continuous or permanent nature of enforced disappearances.[14] In the present case, Mensud Rizvanović was arbitrarily deprived of his liberty on 20 July 1992 and, since then, the violations of his rights and of the rights of the authors continue.

The complaint

3.1 On the admissibility of the communication *ratione temporis*, the authors submit that, even though the events took place before the entry into force of the Optional Protocol for the State party, enforced disappearances of persons is *per se* a continuing violation of several human rights. In the authors' case, the lack of information about the causes and circumstances of the disappearance of Mensud Rizvanović, as well as about the progress and results of the investigations carried out by BiH authorities continue after the Protocol's entry into force. In that regard, the authors submit that the ongoing failure by BiH authorities to carry out an *ex officio*, prompt, impartial, thorough and independent investigation, and to prosecute and punish those responsible for the arbitrary deprivation of liberty, ill-treatment and enforced disappearance of Mensud Rizvanović, as well as the State party's failure to implement the July 2007 decision of the Constitutional Court, amounts to a violation of articles 6, 7, 9, 10 and 16 in conjunction with article 2, paragraph 3 of the Covenant in respect of Mensud Rizvanović.

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[13] Article 74.6 of the Constitutional Court Rules of Procedure states: "in the event of a failure to enforce a decision, or a delay in enforcement or in giving information to the Constitutional Court about the measures taken, the Constitutional Court shall render a ruling in which it shall establish that its decision has not been enforced and it may determine the manner of enforcement of the decision. This ruling shall be transmitted to the competent prosecutor or another body competent to enforce the decision, as designated by the Constitutional Court to adopt the mentioned ruling on the lack of enforcement of previous decisions".

[14] See, inter alia, European Court of Human Rights (ECHR), *Varnava and others v. Turkey*, Grand Chamber judgement of 18 September 2009, paras. 136–148; Inter-American Court of Human Rights (IACHR), *Goiburú and others v. Paraguay*, judgement of 22 September 2006, Series C No. 153; IACHR, *Radilla Pacheco v. México*, judgement of 23 November 2009, Series C No. 209, para. 23–24; WGEID, general comment No. 9 (2010) on enforced disappearance as a continuous crime, available from http://www2.ohchr.org/english/issues/disappear/docs/GC-EDCC.pdf; International Convention for the Protection of all Persons against Enforced Disappearance, art. 8, para. 1; communication No. 400/1990, *Mónaco de Gallicchio v. Argentina*, Views adopted 3 April 1995, para. 10.4.

3.2 The authors consider that the responsibility for shedding light on the fate of Mensud Rizvanović lies with the State party. They refer to a report of the Working Group on Enforced or Involuntary Disappearances (WGEID) which states that the primary responsibility for carrying out these tasks remains with the authorities under whose jurisdiction a suspected mass grave falls.[15] The authors further argue that the State party has an obligation to conduct a prompt, impartial, thorough and independent investigation of gross human rights violations, such as enforced disappearances, torture or arbitrary killings. The obligation to conduct an investigation also applies in cases of killings or other acts affecting the enjoyment of human rights that are not imputable to the State. In these cases, the obligation to investigate arises from the duty of the State to protect all individuals under its jurisdiction from acts committed by private persons or groups of persons which may impede the enjoyment of their human rights.[16]

3.3 With regard to article 6, the authors refer to the Committee's jurisprudence according to which a State party has a primary duty to take appropriate measures to protect the life of a person.[17] In cases of enforced disappearances, the State party has an obligation to investigate and bring perpetrators to justice. The authors consider that the State party's failure to do so in the present case amounts to a violation of Mensud Rizvanović's right to life, in breach of article 6, read in conjunction with article 2, paragraph 3, of the Covenant. Mensud Rizvanović was illegally detained and has remained unaccounted for since 20 July 1992. Despite numerous efforts by the authors, no *ex officio*, prompt, impartial, thorough and independent investigation has been carried out and the victim's fate and whereabouts remain unknown.

3.4 The authors further submit that Mensud Rizvanović was illegally detained without charge by VRS soldiers and that he was held indefinitely, without communication with the outside world, while repeatedly ill-treated and subjected to forced labour. In that regard, the authors consider that the mere fact that Mensud Rizvanović was last seen in the Keraterm camp in the hands of agents known to have committed several other acts of torture and arbitrary killings concretely exposed him to a grave risk of suffering violations of his rights under article 7 of the Covenant. The authors further refer to the jurisprudence of the Committee, according to which enforced disappearance constitutes, in itself, a form of torture,[18] on which no investigation has yet been carried out by the State party in order to identify, prosecute, judge and sanction those responsible in the case under review. The authors consider that this amounts to a violation of article 7, read in conjunction with article 2, paragraph 3, of the Covenant in respect of Mensud Rizvanović.

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[15] See the report by Manfred Nowak, expert member of WGEID responsible for the special process on missing persons in the territory of the former Yugoslavia (E/CN.4/1996/36), para. 78.

[16] See Human Rights Committee, general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, para. 8 *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 40*, vol. I (A/59/40 (Vol. I)), annex III; as well as IACHR, *Chitay Nech and others v. Guatemala*, judgement of 25 May 2010, Series C No. 212, para. 89; IACHR, *Velasquez Rodriguez v. Honduras*, judgement of 29 July 1988, Series C No. 4, para. 172; ECHR, *Demiray v. Turkey*, Application No. 27308/95, judgement of 21 November 2000, para. 50; ECHR, *Tanrikulu v. Turkey*, Application No. 23763/94, judgement of 8 July 1999, para. 103; and ECHR, *Ergi v. Turkey*, Application no. 23818/94, judgement of 28 July 1998, para. 82.

[17] Communication No. 84/1981, *Dermit Barbato v. Uruguay*, Views adopted on 21 October 1982, para. 10.

3.5 The authors further argue that the State party has not provided any explanation as to the arrest of Mensud Rizvanović without a warrant, and his transfer to the Keraterm camp by members of the VRS army. The authors also point out that the detention of Mensud Rizvanović was not recorded in any official register or proceedings brought before a court to challenge its lawfulness. As no explanation has been given by the State party and no efforts have been made to clarify the fate of Mensud Rizvanović, the authors consider that the State party has violated article 9, read in conjunction with article 2, paragraph 3, of the Covenant.

3.6 Mensud Rizvanović was held in Keraterm camp and did not have the possibility of communicating with the outside world. The authors refer to the jurisprudence of the International Criminal Tribunal for the former Yugoslavia (ICTY), in which the conditions endured in Keraterm were qualified as inhumane and degrading.[19] They further recall that eyewitnesses had seen Mensud Rizvanović being ill-treated.[20] The authors recall the Committee's jurisprudence according to which enforced disappearance itself constitutes a violation of article 10 of the Covenant.[21] They consider that the failure by the State party to investigate the torture and inhuman and degrading treatment the victim suffered in detention amounts to a violation of article 10, read in conjunction with article 2, paragraph 3, of the Covenant in respect of Mensud Rizvanović.

3.7 The authors refer to the jurisprudence of the Committee, according to which enforced disappearance may constitute a refusal to recognize the victim before the law if that person was in the hands of the authorities of the State party when last seen, and if the efforts of their relatives to obtain access to effective remedies have been systematically denied.[22] The ceaseless efforts undertaken by the authors to shed light on the fate of Mensud Rizvanović and to access potentially effective remedies have been impeded since his disappearance. The authors therefore consider that the State party is responsible for an ongoing violation of article 16, read in conjunction with article 2, paragraph 3, of the Covenant in respect of Mensud Rizvanović.

3.8 The authors further allege that they are themselves victims of a violation by BiH of article 7, read alone and in conjunction with article 2, paragraph 3, of the Covenant because of the severe mental distress and anguish caused by: (a) the disappearance of Mensud Rizvanović; (b) the *de facto* requirement to declare him dead in order to access a pension; (c) the continued uncertainty about his fate and whereabouts; (d) the failure to investigate and ensure an effective remedy; (e) the lack of attention to their case as reflected, for example, in the use of template letters to reply to their reiterated requests for information, which still remain without answers; (f) the non-implementation of various provisions of the Law on Missing Persons, including those concerning the establishment of the Fund for Support to the Families of Missing Persons; (g) the failure by the State party to implement the judgement of the BiH Constitutional Court.[23] The authors therefore consider that they have been victims of a separate violation of article 7, read alone and in conjunction with article 2, paragraph 3, of the Covenant.

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[18] Communications No. 449/1991, *Mojica v. Dominican Republic*, Views adopted on 10 August 1994, para. 5.7; No. 1327/2004, *Grioua v. Algeria*, Views adopted on 16 August 2007, para. 7.6; No. 1495/2006, *Zohra Madoui v. Algeria*, Views adopted on 1 December 2008, para. 7.4.

[19] See, inter alia, ICTY, *The Prosecutor v. Dusco Sikirica, Damir Dosen and Dragan Kolundzjia*, Case No. IT-95-8-S, Sentencing judgement of 13 November 2001, paras. 52-100; ICTY, *The Prosecutor v. Miroslav Kovcka et al.*, Case No. IT-98-30/1-T, Trial judgement of 2 November 2001, paras. 112–114.

[20] See footnote 6 above.

[21] Communication No. 1469/2006, *Yasoda Sharma v. Nepal*, Views adopted on 28 October 2008, para. 7.7.

[22] Communications No. 1495/2006, *Zohra Madoui v. Algeria*, Views adopted on 1 December 2008, para. 7.7; No. 1327/2004, *Grioua v. Algeria*, Views adopted on 16 August 2007, para. 7.9.

3.9 The authors also consider that the application of specific procedural burdens to civilian victims of war in order for them to access non-pecuniary damages, as opposed to veterans of the VRS, amounts to discrimination in violation of articles 2, paragraph 1, and 26 of the Covenant. In line with this statement, the authors maintain that the rejection of their claim for non-pecuniary damage under the Law on the Right to Compensation for Pecuniary and non-Pecuniary Damage caused by the War Activities in the Period from 20 May 1992 to 19 June 1996, on the ground that Mensud Rizvanović was a civilian victim of war, does not result from the provisions of the relevant legislation, but from the interpretation of the provisions by the Republika Sprska Attorney General's Office. They consider that that interpretation amounts to discrimination in violation of their right to an effective remedy and to fair and adequate compensation and reparation for harm suffered.

The State party's observations

4.1 The State party submitted observations in April 2011. As regards the general framework, the State party submits that in the post-war period, since 1996, a large number of requests for compensation for non-pecuniary damage have been submitted by citizens to courts in the Republika Srpska, which have issued a large number of final judgements ordering the payment of damages in a short period and without discrimination. To avoid undermining the fulfilment of budgetary commitments of the Republika Srpska and its functioning, the Law on Determination and Manner of Settling the Internal Debt of the Republika Srpska was passed on 15 July 2004, providing for pecuniary and non-pecuniary damages caused during the war to be settled by the issue of bonds of the Republika Srpska "with maturity of 14 years". The payment is to be made in 10 instalments within the period of 9 to 14 years after the decision. The State party further states that in order to deal efficiently with those damages, the Republika Srpska passed a special Law on Compensation for Pecuniary and non-Pecuniary Damages, in an attempt to relieve the courts in the Republika Srpska from the caseload involving war damage compensation, trying to enter into extra-judicial settlement upon agreement of the injured party.

4.2 As regards the authors' situation, the State party submits that Fatima Rizvanović filed a request for compensation to the Srpska Attorney General's Office on 13 May 2009. The State party further indicates that article 8, paragraph 2, of the Law on Compensation for Pecuniary and non-Pecuniary Damage, caused by the War Activities in the Period from 20 May 1992 to 19 June 1996 provides for the right to reach extrajudicial settlement for pecuniary and non-pecuniary damage caused during the war to those persons whose requests were received after 19 June 2001, and whose damage was caused "in the military line of duty and duties to defend the country". The State party considers that, as Mensud Rizvanović disappeared as a civilian victim of war and not as military personnel, the Srpska Attorney General's Office did not have jurisdiction to reach an extrajudicial settlement in order to compensate Fatima Rizvanović, and that she had been informed of this situation in writing. The State party considers that Fatima Rizvanović should seek compensation through a civil action before a competent court.

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[23] ECHR, *Suljagic v. Bosnia and Herzegovina*, Application no. 27912/0210, judgement of 3 November 2009, para. 21.

Authors' comments on the State party's observations

5.1 The authors submitted their comments on 12 May 2011 and refer to the Working Group on Enforced or Involuntary Disappearances (WGEID) general comment No. 9 (2010) on enforced disappearance as a continuous crime.[24] They consider that the State party's observations corroborate the fact that Mensud Rizvanović remains registered as a missing person "unaccounted for" and inform the Committee that no match has been found through the online inquiry tool set up by the International Commission on Missing Persons (ICMP). The tracing process is therefore still open under the responsibility of the BiH authorities.

5.2 The authors consider that the observations of the State party do not raise any challenge to the claims they have submitted, nor do they refer to any ongoing investigation to determine those responsible or to measures undertaken to establish the fate and whereabouts of Mensud Rizvanović. The authors refer to the jurisprudence of the Committee, according to which, in such circumstances, due weight must be given to the authors' allegations.[25] They consider that the State party's silence only corroborates that the BiH authorities are not fulfilling their obligation to investigate, bring to trial and punish those responsible for the enforced disappearances. The authors further point out that they had not been contacted by the Missing Persons Institute and consider that silence as another demonstration of the lack of communication between the authorities of the State party and relatives of missing persons.

5.3 The authors reiterate their claim to know the identity of the perpetrators, the fate and whereabouts of Mensud Rizvanović, as well as the progress and results of the search. They also request to be closely associated with all the steps of the proceedings initiated by the competent authorities of the State party. In that regard, the authors refer to the Working Group on Enforced and Involuntary Disappearances (WGEID) general comment No. 10 (2010) on the right to the truth in relation to enforced disappearance which identifies the participation of the relatives of the victim as part of their right to the truth (para. 3).[26]

5.4 The authors submit that their case must be read in the overall situation of impunity of war crimes. Many obstacles are practical in nature, such as limited prosecutorial resources, lack of necessary expertise and lack of witness protection. The authors also consider that this situation results from a lack of willingness on the part of the police to investigate, and from the failure of prosecutors to make use of available evidentiary sources.[27]

5.5 The authors further argue that the State party's observations only refer to the issue of the claim for non-pecuniary compensation that was submitted by Fatima Rizvanović on 19 May 2009. They indicate that the appeal she presented on 28 September 2010 against the decision of the Republika Srpska Attorney General Office was still pending at the time of their submission of the present communication.

5.6 The authors consider that the letter of the Republika Srpska Attorney General Office confirms the existence of discrimination in the enjoyment of the right to an effective remedy to the detriment of civilian victims of war. In its submission, the State party does not challenge the existence of such discrimination nor does it submit any comment as to the fact that the authors have not received redress and reparation. The authors consider that that silence corroborates their arguments on this issue.

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[24] See A/HRC/16/48, para. 39, available from http://www.ohchr.org/EN/ISSUES/DISAPPEARANCES/Pages/DisappearancesIndex.aspx.

[25] See, inter alia, communication No. 886/1999, *Banderenko v. Belarus*, Views adopted on 28 April 2003, para. 10.2.

[26] See A/HRC/16/48, para. 39, available from http://www.ohchr.org/EN/ISSUES/DISAPPEARANCES/Pages/DisappearancesIndex.aspx.

[27] See Report of the Commissioner for Human Rights of the Council of Europe, Following his visit to Bosnia and Herzegovina on 27–30 November 2010 (CommDH(2011)11, paras. 132 and 133.

5.7 The authors inform the Committee that, on 22 March 2011, the Constitutional Court replied to Fatima Rizvanović's request for the adoption of a ruling of non-implementation of the Court's decision of 16 July 2007. In that letter, the Court stated that on 27 March 2009, it had adopted an Information on the Enforcement of Constitutional Court Decisions in the period from 1 January until 31 December 2008, and that the Court's decision of 16 July 2007 was therefore considered enforced. The authors argue that they had to wait two years to receive information concerning the decision, the adoption of which does not reflect the reality, as the Fund has still not been established and no information has been provided as to the fate and whereabouts of Mensud Rizvanović. The authors consider that the decision reflects the systemic problem of non-implementation of the Constitutional Court's decisions and is a further sign of indifference on the part of the BiH authorities.

Further submissions from the State party

6.1 On 4 and 17 August 2011, the State party provided further information in response to the authors' comments. The Republika Srpska Attorney General's Office considers that it is not competent to address the authors' request for compensation because it is only in charge of the representation and protection of property interests of Republika Srpska for civil matters. It is the Prosecutor's Office that has jurisdiction over criminal matters. It therefore argues that the decision dismissing the authors' claim was adopted for lack of jurisdiction. In addition, taking into account that the Law on Compensation for Pecuniary and non-Pecuniary Damages, caused during the war is not the only relevant legislation, and that other procedures exist for the authors to exercise their right to compensation, the State party considers that the authors have not sufficiently substantiated their claim as to the discriminatory character of the decision in question.

6.2 The State party argues that significant efforts have been made to improve the process of tracing missing persons, particularly through the adoption of the 2004 Law on Missing Persons and the establishment of an Operational Team for Tracing Missing Persons by the Republika Srpska Government.

6.3 The State party further submits that a lot of success has been achieved in the quest to determine the whereabouts or fate of missing persons. During the war, nearly 30,000 people went missing, of which more than 20,000 have been exhumed and more than 18,000 identified. Since its creation, the Missing Persons Institute has taken measures for a faster and more efficient process of searching, including through the creation of regional offices and organizational units. At the time of the present submission, more than 769 exhumations had been carried out, and others were still pending, while 800 persons were still missing in the municipality of Prijedor, including Mensud Rizvanović.

6.4 The State party considers that, in order to avoid additional trauma, family members are not usually informed of exhumations and DNA testing. However, the State party submits that on 16 September 2010, they informed Fatima Rizvanović that exhumations were pending in the area of Prijedor Municipality, and that they would notify her if a preliminary identification of her son was to be carried through DNA analysis.

Further comments from the authors

7.1 On 15 September 2011, the authors sent their additional comments, in which they considered that the State party's reply did not provide any new information with regard to the enforced disappearance of Mensud Rizvanović, and that it failed to address a number of the issues that they had raised. The authors therefore reiterate their previous submissions.

7.2 The authors further inform the Committee that on 1 April 2011, the Ministry of Justice of Republika Srpska issued a decision rejecting the appeal presented by Fatima Rizvanović against the decision of the Republika Srpska Attorney General's Office regarding her claim for non-pecuniary damage and inviting her to turn to ordinary courts. The authors argue that since Mensud Rizvanović was a civilian, the existing legal framework does not allow his relatives to obtain compensation for non-pecuniary damages in the same way as the relatives of a veteran could do. Furthermore, they consider that it is the practice of regular courts to reject claims for non-pecuniary damage for harm suffered during the war, as they apply a statute of limitations of a subjective three years and an objective five years. The authors therefore argue that they do not dispose of an effective remedy.

Issues and proceedings before the Committee

Consideration of admissibility

8.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether the case is admissible under the Optional Protocol to the Covenant.

8.2 As required under article 5, paragraph 2 (a), of the Optional Protocol, the Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement and that the authors have exhausted all available domestic remedies.

8.3 The Committee notes that the State party has not challenged the admissibility of the communication and that the authors' allegations have been sufficiently substantiated for the purposes of admissibility. All admissibility criteria having been met, the Committee declares the communication admissible and proceeds to its Consideration of the merits.

Consideration of the merits

9.1 The Human Rights Committee has considered the present communication in the light of all information made available to it by the parties, as required under article 5, paragraph 1, of the Optional Protocol.

9.2 The authors claim that Mensud Rizvanović is a victim of enforced disappearance at the hands of the VRS since his illegal arrest on 20 July 1992, and that despite their numerous efforts, no prompt, impartial, thorough and independent investigation has been carried out by the State party to clarify his fate and whereabouts and to bring the perpetrators to justice. In that respect, the Committee recalls its general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, according to which failure by a State party to investigate allegations of violations and to bring to justice perpetrators of certain violations (notably torture and similar cruel, inhuman and degrading treatment, summary and arbitrary killings and enforced disappearances) could in and of itself give rise to a separate breach of the Covenant.

9.3 The authors do not allege that the State party is directly responsible for the enforced disappearance of their relative.

9.4 The Committee notes the State party's information that it has made considerable efforts at the general level in view of the more than 30,000 cases of enforced disappearances that occurred during the conflict. Notably, the Constitutional Court has established that authorities of the State party are responsible for the investigation of the disappearance of the authors' relatives (see para. 2.8 above); domestic mechanisms have been set up to deal with enforced disappearances and other war crimes cases (see para. 4.2

above); and DNA samples from a number of unidentified bodies have been compared with the DNA samples of Fatima and Mensud Rizvanović's children.

9.5 The Committee recalls its jurisprudence, according to which the obligation to investigate allegations of enforced disappearances and to bring the perpetrators to justice is not an obligation of result, but of means, and that it must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities of the State party.[28] However, the Committee notes that, according to the information provided by the authors and the State party, no specific measures have been undertaken to investigate the arbitrary deprivation of liberty, ill-treatment and enforced disappearance of Mensud Rizvanović and to bring those responsible to justice. The Committee further notes, inter alia, that the authors have never been consulted by the Constitutional Court on whether the decision of 16 July 2007 had been enforced; that they were not informed of the adoption of the Constitutional Court decision of 27 March 2009 stating that the decision was enforced; no information has been provided as to the fate and whereabouts of Mensud Rizvanović; and the Fund for Support to the Families of Missing Persons has still not been established. Finally, the Committee notes that the limited information that the family managed to obtain throughout the proceedings was only provided to them at their own request, or after very long delays, a fact that has not been refuted by the State party. The Committee considers that information on the investigation of enforced disappearances must be made promptly accessible to the families.[29] Accordingly, the Committee concludes that, in the circumstances, the facts before it reveal a violation of article 2, paragraph 3, of the Covenant, read in conjunction with articles 6, 7, and 9, with regard to the authors and their disappeared relative.

9.6 The Committee further notes that the social allowance provided to the authors depended upon their acceptance to recognize their missing relative as dead, while there is no certainty as to his fate and whereabouts. The Committee considers that to oblige families of disappeared persons to have the person declared dead in order to be eligible for compensation while an investigation is ongoing, makes the availability of compensation dependent on a harmful process, and constitutes an inhumane and degrading treatment in violation of article 7, read alone and in conjunction with article 2, paragraph 3, of the Covenant with respect to the authors.[30]

9.7 In the light of the above findings, the Committee will not examine separately the author's allegations under article 2, paragraph 3, read in conjunction with articles 10 and 16 of the Covenant.

9.8 As regards the alleged violation of articles 2, paragraph 1, and 26 of the Covenant, the Committee notes the argument of the authors that the Law on Compensation for Pecuniary and non-Pecuniary Damages, caused by the War Activities in the Period from 20 May 1992 to 19 June 1996 and its subsequent amendments do not exclude civilians from the right to receive compensation, and that the exclusion referred to results from the interpretation of the law by the Attorney General's Office and is discriminatory. The Committee further notes that, according to the State party, the non-applicability of the said legislation to civilians and their families arises from article 8, paragraph 2, of the said law which specifies that the law only applies to damages caused "in the military line of duty and duties to defend the country". The Committee further notes the argument of the State party that other procedures exist for the authors to exercise their right to compensation, and that the authors therefore do not sufficiently substantiate their claim as to the discriminatory character of the law and its interpretation. In the absence of any further information before it, the Committee considers that the available information does not enable it to find a violation of the authors' rights under articles 26 and 2, paragraph 1, of the Covenant.

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[28] See communications Nos. 1917/2009, 1918/2009, 1925/2009 and 1953/2010, *Prutina and others v. Bosnia and Herzegovina*, Views adopted on 28 March 2013, para. 9.5.

[29] Ibid., para. 9.6.

[30] Ibid.

9.9 The Committee further acknowledges that, according to the most recent information provided by Ruvejda Rizvanović, Fatima Rizvanović passed away on 19 May 2013, without having fulfilled her right to the truth, to justice and to reparation for the enforced disappearance of her son.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the State party has violated the authors' rights under article 2, paragraph 3, of the Covenant in connection with articles 6, 7 and 9 of the Covenant with regard to the authors and their disappeared relative; and article 7, read alone with regard to the authors.

11. In accordance with article 2, paragraph 3, of the Covenant, the State party is under an obligation to provide Ruvejda Rizvanović and her family with an effective remedy, including: (a) continuing its efforts to establish the fate or whereabouts of Mensud Rizvanović, as required by the Law on Missing Persons of 2004; (b) continuing its efforts to bring those responsible for his disappearance to justice and to do so by the end of 2015, as required by the National War Crimes Strategy; and (c) ensuring adequate compensation. The State party is also under an obligation to prevent similar violations in the future and must ensure, in particular, that investigations into allegations of enforced disappearances are accessible to the missing persons' families, and that social benefits and measures of reparations are effectively provided to relatives of victims of enforced disappearance, without the obligation for them to obtain a municipal court's decision certifying the death of the victim.

12. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether or not there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective remedy when it has been determined that a violation has occurred, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the present Views. The State party is also requested to publish the present Views and to have them widely disseminated in all three official languages of the State party.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Appendix

Individual opinion of Committee member Gerald L. Neuman, joined by Committee member Anja Seibert-Fohr (concurring)

I write separately to address two issues that the majority has defensibly chosen not to reach. The authors asked the Committee also to find that the State party had violated the obligation to provide an effective remedy for violations of articles 10 and 16 of the Covenant. I would address those claims, and find that they are not substantiated, for legal reasons that it would be useful to explain.

First, as a general matter:

The Committee has frequently held that enforced disappearances conducted by State authorities result in violations of article 10, which guarantees humane treatment of persons deprived of their liberty. But the State's obligations under article 10 concern the conditions of detention under its own authority, not the forms of lawless deprivations of liberty by others.[a] Article 10 differs in this respect from article 7, which requires States parties "to take positive measures to ensure that private persons or entities do not inflict torture or cruel, inhuman or degrading treatment or punishment on others within their power."[b] The fact that an enforced disappearance has occurred does not imply that the State has violated its obligations under article 10, when the disappearance is not attributable to the State.

Similarly, the Committee has concluded that enforced disappearances conducted by State authorities may, in appropriate factual circumstances, violate article 16, which guarantees the right to recognition as a person before the law. It is difficult to see how actors who are not agents of a State, acting without collusion by that State, could themselves negate the recognition by that State of a victim as a person before the law. Thus the fact that an enforced disappearance has occurred in the State's territory does not imply that the State has violated article 16, when the disappearance is not attributable to the State.

Turning to the present case, the authors do not allege that the enforced disappearance of Mensud Rizvanović was attributable to Bosnia and Herzegovina, but rather to armed forces that opposed it. They appear merely to assume that because the atrocity inflicted upon him can be described as an enforced disappearance, articles 10 and 16 must have been implicated, generating additional obligations to provide effective remedies under article 2, paragraph 3 of the Covenant. I would have preferred to explain that this reasoning is erroneous. Without a further basis for connecting the State party to the disappearance, I would hold that the authors have not substantiated their claims that the State party violated article 2, paragraph 3 in conjunction with article 10 or article 16.

[Done in English. Subsequently to be issued also in Arabic, Chinese, French, Russian and Spanish as part of the present report.]

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[a] See Human Rights Committee, general comment No. 21 (1992) on humane treatment of persons deprived of their liberty, para. 2, *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40* (A/47/40), annex VI, sect. B.

[b] Human Rights Committee, general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, para. 8, *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 40*, vol. I (A/59/40 (Vol. I)), annex III.

HH. Communication No. 2006/2010, *Almegaryaf and Matar v. Libya* (Views adopted on 21 March 2014, 110th session)*

Submitted by:	Youcif Almegaryaf and Hisham Matar (represented by TRIAL (Track Impunity Always))
Alleged victims:	Izzat Yousef Al-Maqrif and Jaballa Hamed Matar (the authors' fathers respectively), and the authors
State party:	Libya
Date of communication:	10 November 2010 (initial submission)
Subject matter:	Enforced disappearance
Procedural issue:	Lack of cooperation from the State party
Substantive issues:	Right to life, prohibition of torture and cruel and inhuman treatment, right to liberty and security of person, right of all persons deprived of their liberty to be treated with humanity and dignity, recognition as a person before the law, right to an effective remedy, and child protection
Articles of the Covenant:	Articles 2 (para. 3), 6 (para. 1), 7, 9 (paras. 1–4), 10 (para. 1), 16 and 24 (para. 1)
Article of the Optional Protocol:	Article 5, paragraph 2 (a)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 21 March 2014,

Having concluded its consideration of communication No. 2006/2010, submitted to the Human Rights Committee by Youcif Almegaryaf and Hisham Matar under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the authors of the communication,

Adopts the following:

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* The following members of the Committee participated in the examination of the present communication: Mr. Yadh Ben Achour, Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Walter Kälin, Ms. Zonke Zanele Majodina, Mr. Victor Manuel Rodríguez-Rescia, Mr. Fabián Omar Salvioli, Ms. Anja Seibert-Fohr, Mr. Yuval Shany, Ms. Margo Waterval and Mr. Andrei Paul Zlătescu.

In accordance with article 91 of the Committee's rules of procedure, Mr. Gerald L. Neuman and Sir Nigel Rodley, members of the Committee, did not take part in the consideration of the communication.

Views pursuant to article 5, paragraph 4, of the Optional Protocol

1. The authors of the communication, dated 10 November 2010, are Youcif Almegaryaf, a national of the United States, and Hisham Matar, a national of the United States and of the United Kingdom, who claim that their respective fathers, Izzat Youcef Al-Maqrif and Jaballa Hamed Matar, Libyan nationals born in 1952 in Benghazi, Libya, and in 1937 in Ajdabiya, Libya, respectively, are victims of violations by Libya[1] of articles 2, paragraph 3; 6, paragraph 1; 7; 9, paragraphs 1–4; 10, paragraph 1; and 16 of the Covenant. The authors also claim that they themselves are victims of a violation of articles 2, paragraph 3; and 7 of the Covenant. Mr. Almegaryaf claims that he is also the victim of a violation of article 24, paragraph 1. The authors are represented by TRIAL (Track Impunity Always).

Facts as submitted by the authors

2.1 Mr. Izzat Yousef Al-Maqrif, an army officer, was arrested in 1973 after having been accused of taking part in an attempt to overthrow the government of Muammar Gaddafi. He was jailed for almost a year without being charged, after which he was released and discharged from the army. In 1981 he left Libya with his wife and settled in Rabat, Morocco, to escape Mr. Gaddafi's policy of repression against political opponents, and to join the National Front for the Salvation of Libya (NFSL). His son, Youcif Almegaryaf, was born in Rabat in 1983. In 1984, the family moved to Cairo, Egypt, where Mr. Al-Maqrif became a senior member of the Executive Committee of NFSL.

2.2 Jaballa Hamed Matar was a colonel in the Libyan army when the 1969 military coup took place. He was arrested in 1970 and released six months later. Shortly thereafter, he was appointed counsellor at the Ministry of Foreign Affairs, and joined the Libyan Mission to the United Nations in New York. During this time his son, Hisham Matar, was born. He resigned from his post in 1972 and, in 1973, returned to Tripoli, where he became a successful businessman. In 1978, during a trip to Italy, he learned that his name appeared on a list of people wanted for interrogation. In 1979, his wife and two children were able to leave Libya, and the family settled in Cairo, Egypt, where Mr. Matar became a member of the Executive Committee of the NFSL.

2.3 On 4 and 5 March 1990 Izzat Yousef Al-Maqrif and Jaballa Hamed Matar were taken from their homes in Cairo by agents of the Egyptian State Security Investigation Bureau (Mabahith Amn al-Dawla al-Ulya). They were then taken to the headquarters of the State Security Investigation Bureau in Lazoghli Square in Cairo, where they were interrogated in the presence of agents of the Egyptian General Intelligence Directorate on their activities with NFSL. They were released but their passports were confiscated without explanation.

2.4 On 12 March 1990 they were again taken from their homes by agents of the Egyptian General Intelligence Directorate to the office of the deputy head of the Directorate. They never returned home and their fate and whereabouts remain unknown.

2.5 The families believed that they were being held in Egypt, and thus several attempts were made to find out their whereabouts from the Egyptian authorities, both by relatives and NFSL members, but to no avail. According to the testimony of a friend, on 14 March 1990 he, together with other NFSL members, met with Colonel N.A. from the Egyptian General Intelligence Directorate with a view to finding out what had happened to Mr. Al-Maqrif and Mr. Matar. During that meeting Colonel N.A. claimed that the two men had been smuggled to Libya by NFSL or that they might have left Egypt as they each had more than one passport. Colonel N.A. further warned the NFSL members not to talk to the press about the case and threatened that there would be consequences for them and the members of their families who resided in Egypt if they did so. According to the NFSL Political Commissioner at the time, who was dispatched to Egypt in June 1990 with the aim of contacting the Egyptian authorities in person, he requested to meet with Colonel N.A. but the latter refused and expressed his anger that the matter had become known to the public, including human rights organizations. Similarly, Mr. Matar's wife was warned by officials of the Egyptian State Security Investigation Bureau not to continue investigating her husband's disappearance as otherwise his safety could not be guaranteed.

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[1] The Optional Protocol entered into force for the Libyan Arab Jamahiriya on 16 May 1989.

2.6 In 1992, the disappearances were brought to the attention of the Working Group on Enforced or Involuntary Disappearances, in relation to Egypt through a report submitted by Amnesty International. The cases were mentioned in several annual reports of the Working Group. However the Working Group was unable to obtain clarification about the fate or whereabouts of Mr. Al-Maqrif and Mr. Matar.

2.7 In late 1993 or early 1994, a friend of Mr. Al-Maqrif's family received a smuggled letter from Mr. Al-Maqrif[2] in which he indicated that he and Mr. Matar had been transferred to Tripoli the day after their arrest in Cairo and subsequently held in Abu-Salim prison. Mr. Al-Maqrif's brother testifies to having seen the letter in late 1994, at which time he learned about the transfer of Mr. Al-Maqrif and Mr. Matar to Tripoli in March 1990.[3] In total, the family received from Mr. Al-Maqrif four smuggled letters and a series of poems, all alleged to have been written in 1993–1994. All the letters were handed to Mr. Almegaryaf only in 2009. Between late 1995 and early 1996, Mr. Matar's family and friends received three smuggled letters and one tape of a letter recorded by him.[4] These describe the men's handover from the Egyptian to the Libyan authorities on 13 March 1990, their transfer to Tripoli, and their imprisonment in Abu-Salim prison. They indicate that upon their arrest, on 12 March 1990, they were detained in separate rooms at the headquarters of the Egyptian General Intelligence Directorate and forbidden to return home. On the following day, they were taken away by agents of the Directorate in a truck with windows covered in newspaper on the inside. After a short drive the truck stopped and they were handed over to Libyan military police. They were then transported in a private Libyan jet to Tripoli, and upon arrival, taken to Abu Salim prison in Tripoli.

2.8 A former fellow inmate in Abu-Salim prison claimed that he had seen Mr. Al-Maqrif and Mr. Matar in Abu-Salim prison a few months after their handover — between 1991 and 1992 — and that they had told him about the circumstances of their transfer from Cairo to Tripoli. He claimed to have seen them for the last time on the day of the Abu-Salim prison "massacre" in June 1996 when they were taken away from their cell by prison guards. According to the authors, it is believed that about 1,200 prisoners were killed in this "massacre".

2.9. The former fellow inmate indicated that all prisoners in Abu-Salim prison were tortured, without exception. He claimed that Mr. Al-Maqrif and Mr. Matar had diabetes and suffered from high blood pressure and that access to a doctor was limited in the prison. They were initially held in solitary confinement and later shared a cell. They were not allowed to have contact with other prisoners or the outside world, including legal counsel. No one in Abu-Salim prison was allowed to submit requests or complaints, and those who did were killed. The authors further submit that Mr. Matar confirmed in one of his smuggled letters, believed to have been written in 1995, that he and Mr. Al-Maqrif shared a cell but that they were isolated and prevented from having contact with the other prisoners. In that letter Mr. Matar also described the cruelty practised in the prison.[5]

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[2] Copies of two of the letters were submitted to the Committee.

[3] The testimony of Mr. Al-Maqrif's brother was annexed to the communication.

[4] A copy of one of Mr. Matar's letters is contained on file. This letter is undated but was presumably written in 1995.

2.10 The poor conditions in Abu-Salim prison have been widely documented. A report by the United Nations Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment[6] indicates that prison conditions were harsh and that the lack of adequate food, medical care and the use of torture and other forms of ill-treatment had resulted in the deaths of prisoners.

2.11 In 2001 a relative of Mr. Matar who was a lawyer in Libya discovered that the name of Mr. Matar appeared in an indictment by the Prosecutor of the Armed Populace. Although he was not indicted in that specific court case, Mr. Matar was referred to as the person who had recruited the indictees to carry out insurgency activities. During the trial before the Permanent Military Court, the Defence noted that Mr. Matar was being tried in absentia, but that his statements had never been recorded or documented. The Defence therefore asked for Mr. Matar to be brought before the court. This request yielded no result. The indictees in that court case were all convicted in February 2002. According to the authors, Mr. Matar had apparently been found guilty and sentenced to death in another trial. However, it is unknown whether the sentence was carried out and there are no documents on the alleged case against him.

2.12 Hisham Matar submits that in 2008 he received information, through an informant, from a former prisoner of Abu-Salim prison that his father had been seen in 2002 at a high-security prison nicknamed "Gates of Hell" in Tripoli.

2.13 The authors submit that the circumstances under which both families fled Libya coincided with the passage of legislation prohibiting the formation of associations or political parties and punishing any form of criticism of the political system in place. The arrests and transfer to Libya coincided with the mass arrests carried out by the Libyan authorities in 1989 when the regime was cracking down on perceived dissidents.

2.14 The authors add that a policy known as "physical liquidation" of opponents was introduced in the early 1980s and endorsed at the highest levels. The policy extended to opponents living abroad, and Egypt and Libya would exchange opposition activists in that framework.

2.15 The authors and their families have unsuccessfully sought information about the fate and whereabouts of Mr. Al-Maqrif and Mr. Matar from the Libyan authorities. Among other attempts, Mr. Al-Maqrif's brother met in January–February 2007 with the then Libyan Minister of Foreign Affairs, who did not provide any information. In 2008, a relative submitted a request concerning Mr. Al-Maqrif's disappearance to the Libyan Intelligence Office in Benghazi which received no reply. Among other attempts to locate his father, on 18 January 2010 in London, Mr. Hisham Matar met with Seif El-Islam Gaddafi, who confirmed to him that his father had been kidnapped by the Egyptian authorities, handed over to the Libyan authorities and taken to Libya. However, Seif El-Islam Gaddafi denied knowing anything about his fate or whereabouts. In an exchange of letters between Amnesty International and the Libyan authorities concerning the fate and whereabouts of the two disappeared persons, the Libyan authorities denied having information about them and claimed that they lived outside Libya.

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[5] A copy of the letter is contained on file.

[6] Report of 12 January 1999 by the Special Rapporteur on the question of torture, (E/CN.4/1999/61, para. 448).

2.16 The authors contend that domestic remedies are neither available nor effective in Libya for victims of human rights violations, due to fear of reprisals against themselves and their families. In their case, this fear was also based on the fact that their fathers were high-ranking members of a prohibited opposition party. It was also based on the existence of the Charter of Honour, which acted as a deterrent to bringing claims by victims of human rights violations living in Libya, the lack of independence of the judiciary, and the prevailing atmosphere of complete impunity.

The complaint

3.1 The authors claim that their fathers were subjected to enforced disappearance after their handover to the Libyan authorities on 13 March 1990. As members of a well-known opposition group and in the context of a policy of systematic disappearances and assassinations, Mr. Al-Maqrif and Mr. Matar were placed at grave risk of suffering irreparable damage to their personal integrity and lives. By failing to conduct an ex-officio investigation into the disappearance of their fathers, the State party has failed to comply with its obligation to prevent arbitrary deprivation of life. In addition it failed to investigate their enforced disappearance or to establish their fate and whereabouts, or to bring suspected perpetrators to justice and sanction them if convicted. The authors claim that the State has thereby violated article 6 of the Covenant separately and in conjunction with its article 2, paragraph 3.

3.2 The State party violated article 7 of the Covenant by virtue of subjecting Mr. Al-Maqrif and Mr. Matar to enforced disappearance. Moreover, their prolonged incommunicado detention, coupled with the inability to have any kind of contact with the outside world, also constitutes a violation of article 7. The authors add that the State party's failure to launch an effective investigation with a view to bringing perpetrators to justice and punish those convicted, amount to a violation of article 7 in conjunction with article 2, paragraph 3, of the Covenant.

3.3 The authors also recall that, owing to the general detention conditions in which their fathers were or are still being held, in particular the isolating nature of detention and the lack of medical attention, both articles 7 and 10, paragraph 1, have been violated. The authors recall the Committee's previous finding that the conditions of detention at Abu-Salim prison violate article 10, paragraph 1. The authors also refer to rule 22 of the Standard Minimum Rules for the Treatment of Prisoners on provision of medical care and treatment for sick prisoners and claim that the lack of access to a doctor as required by the medical conditions of their fathers amounted to a violation of articles 7 and 10, paragraph 1, of the Covenant.

3.4 The authors claim that their fathers are victims of violations of article 9. They had been abducted from foreign soil through collaboration with the Egyptian authorities, attacked, handcuffed and transferred to Abu-Salim prison in Tripoli, and thereafter held for more than 20 years in incommunicado detention – if they were still alive. This amounts to a violation of article 9, paragraph 1. With regard to article 9, paragraph 2, the authors submit that their fathers had not been informed at the time of their arrest by the Egyptian authorities, nor upon their transfer under the control of the Libyan authorities, nor at any other point of the reasons for their arrest or the charges against them. With regard to article 9, paragraph 3, the authors claim that the arrest of their fathers was never entered into the official records and that they were never brought before a judge or any other judicial officer nor given the possibility to challenge the legality of their detention. Furthermore, they claim that their unacknowledged detention for more than 20 years, together with the failure of the State party to investigate their deprivation of liberty and subsequent enforced disappearance, amount to a violation of article 9, paragraph 3, separately and in conjunction with article 2, paragraph 3. With regard to article 9, paragraph 4, the authorities deprived them of access to a legal counsel or family, thus making it impossible for them to challenge the legality of their detention in violation of this provision.

3.5 The authors further claim that their fathers' right to recognition as a person before the law was violated as a result of their enforced disappearance in violation of article 16 of the Covenant, alone and in conjunction with article 2, paragraph 3.

3.6 The authors also submit that their fathers are victims of a violation of article 2, paragraph 3. Since their deprivation of liberty had not been acknowledged they had also been deprived of the possibility to seek an effective remedy. The efforts made by their families to locate them were frustrated by the systematic denial by the Libyan authorities of their involvement in the disappearance.

3.7 The authors contend that they are themselves victims of violations of their rights under article 7 in conjunction with article 2, paragraph 3, of the Covenant, as the enforced disappearance of their fathers has marked their whole lives and caused them ongoing feelings of uncertainty and anguish which still persist. Mr. Almegaryaf further submits that he was 6 years of age at the time his father disappeared, and that, by failing to adopt special measures for his protection as a minor, Libya has violated article 24, paragraph 1, of the Covenant. Finally, the authors claim that they have never received any compensation or measure of reparation for the damage caused over the last 20 years.

Authors' additional submission

4. On 30 September 2011, the authors informed the Committee about the discovery of a mass grave near Abu-Salim prison on 25 September 2011. The authors claimed that these human remains are believed to be those of prisoners massacred by the former Libyan regime in June 1996. In relation to this recent discovery and based on concurring evidence that their fathers were detained in Abu-Salim prison between the years 1991 and 1996, and the possibility that they died in the 1996 massacre, the authors requested a series of interim measures in order to, inter alia, preserve the site, exhume the remains and identify them.[7]

Lack of cooperation from the State party

5. On 22 November 2010, 21 December 2011, 18 April 2012, 19 June 2012 and 6 June 2013, the State party was requested to submit its observations on the admissibility and merits of the communication. The Committee notes that this information has not been received. It regrets the State party's failure to provide any information on the admissibility and/or merits of the authors' claims. It recalls that, in accordance with article 4, paragraph 2, of the Optional Protocol, the State party concerned is required to submit to the Committee written explanations or statements clarifying the matter and indicating the measures, if any, that have been taken by the State to remedy the situation. In the absence of a reply from the State party, the Committee must give due weight to those of the authors' allegations that have been properly substantiated.[8]

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[7] In the absence of more specific information, this request for interim measures was not granted by the Committee.

[8] See, inter alia, communications No. 1913/2009, *Abushaala v. Libya*, Views adopted on 18 March 2013, para. 6.1; No. 1751/2008, *Aboussedra v. Libyan Arab Jamahiriya*, Views adopted on 25 October 2010, para. 4; No. 1640/2007, *El Abani v. Libyan Arab Jamahiriya*, Views adopted on 26 July 2010, para. 4; No. 1776/2008, *Bashasha v. Libyan Arab Jamahiriya*, Views adopted on 20 October 2010, para. 4.2; No. 1422/2005, *El Hassy v. Libyan Arab Jamahiriya*, Views adopted on 24 October 2007, para. 4; No. 1295/2004, *El Alwani v. Libyan Arab Jamahiriya*, Views adopted on 11 July 2007, para. 4; No. 1208/2003, *Kurbonov v. Tajikistan*, Views adopted on 16 March 2006, para. 4; and No. 760/1997, *Diergaardt et al. v. Namibia*, Views adopted on 25 July 2000, para. 10.2.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claim contained in a communication, the Human Rights Committee must decide, in accordance with rule 93 of its rules of procedure, whether the communication is admissible under the Optional Protocol to the Covenant.

6.2 As required under article 5, paragraph 2 (a), of the Optional Protocol, the Committee must ascertain that the same matter is not being examined under another procedure of international investigation or settlement. The Committee notes that the case of Izzat Yousef Al-Maqrif and Jaballa Hamed Matar was submitted to the Working Group on Enforced or Involuntary Disappearances, in relation to Egypt. In addition to the fact that the case was not submitted to the Working Group in relation to Libya, the Committee recalls that extra-conventional procedures or mechanisms established by the Commission on Human Rights or the Human Rights Council, and whose mandates are to examine and report publicly on human rights situations in specific countries or territories, or cases of widespread human rights violations worldwide, do not generally constitute an international procedure of investigation or settlement within the meaning of article 5, paragraph 2 (a), of the Optional Protocol.[9] Accordingly, the Committee considers that it is not precluded from examining the present case under this provision.

6.3 With regard to the exhaustion of domestic remedies, the Committee reiterates its concern that, despite five reminders addressed to the State party, no observations on the admissibility or merits of the communication have been received. In the circumstances and in the absence of a challenge by the State party to the admissibility of the communication, the Committee finds that it is not precluded from considering the communication under article 5, paragraph 2 (b), of the Optional Protocol.

6.4 The Committee considers that the authors' claims regarding the violations of the rights of Izzat Yousef Al-Maqrif and Jaballa Hamed Matar under articles 2, paragraph 3; 6, paragraph 1; 7; 9, paragraphs 1–4; 10, paragraph 1; and 16, have been sufficiently substantiated for purposes of admissibility. It therefore declares the communication admissible and proceeds to its examination on the merits.

6.5 The Committee notes the authors' claims that they are victims of a violation by Libya of their rights under article 7, in conjunction with article 2, paragraph 3, of the Covenant as a result of the enforced disappearance of their fathers. Mr. Almegaryaf also claims to be a victim of violation by Libya of his rights under article 24, paragraph 1, of the Covenant. The Committee recalls that, under article 1 of the Optional Protocol, a State party recognizes the competence of the Committee to consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State party of any of the rights set forth in the Covenant. The Committee observes that Mr. Almegaryaf is a national of the United States of America, was born in Rabat and has never lived in Libya. Hisham Matar is a national of the United States of America and the United Kingdom and has not lived in Libya since 1979. The question which arises is, therefore, whether the obligations of the State party under the Covenant apply to the authors of the present communication. The Committee considers that it is not prevented from examining the authors' claims on their own behalf, since their fathers' enforced disappearance had a direct negative impact on their lives and caused them ongoing feelings of anguish and uncertainty, in particular for the first author, who was 6 years old at the time of his father's disappearance.

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[9] See, inter alia, communications No. 1781/2008, *Berzig v. Algeria*, Views adopted on 31 October 2011, para. 7.2; No. 1776/2008, *Bashasha v. Libyan Arab Jamahiriya* (see footnote 8), para. 6.2; and No. 540/1993, *Celis Laureano v. Peru*, Views adopted on 25 March 1996, para. 7.1.

Consideration of the merits

7.1 The Human Rights Committee has considered the present communication in the light of all information made available to it, in accordance with article 5, paragraph 1, of the Optional Protocol.

7.2 The Committee takes note of the authors' unrefuted allegation that Izzat Yousef Al-Maqrif and Jaballa Hamed Matar were handed over on 13 March 1990 from the Egyptian to the Libyan authorities, transferred to Tripoli and detained in Abu-Salim prison, until last seen in that prison in June 1996. The Committee notes that the families have never received any official confirmation of their transfer to Libya or their place of detention. It also notes that the State party has provided no response to the authors' allegations regarding the enforced disappearance of their fathers. It reaffirms that the burden of proof cannot rest solely on the authors of the communication, especially considering that the author and the State party do not always have equal access to evidence and that frequently the State party alone has access to the relevant information.[10] It is implicit in article 4, paragraph 2, of the Optional Protocol that the State party has the duty to investigate in good faith all allegations of violations of the Covenant made against it and its representatives and to provide the Committee with the information available to it. In cases where the authors have submitted allegations to the State party that are corroborated by credible evidence and where further clarification depends on information that is solely in the hands of the State party, the Committee may consider authors' allegations substantiated in the absence of satisfactory evidence or explanations to the contrary presented by the State party.

7.3 The Committee further takes note of the information provided to the authors by witnesses, according to which Mr. Izzat Yousef Al-Maqrif was last seen alive in June 1996 in Abu-Salim prison, while Mr. Jaballa Hamed Matar was last seen alive in a high security prison in Tripoli in 2002. The Committee also notes the letters sent by the authors' fathers from their place of detention, wherein they explain the circumstances under which they were transferred to Tripoli on 13 March 1990 after having been handed over to the Libyan authorities.

7.4 The Committee recalls that in cases of enforced disappearance, the deprivation of liberty followed by a refusal to acknowledge the deprivation of liberty, or by concealment of the fate of the disappeared person, places such person outside the protection of the law, and places his or her life at serious and constant risk, for which the State is accountable.[11] In the present case the Committee notes that the State party has produced no evidence to show that it has met its obligation to protect the lives of Izzat Yousef Al-Maqrif and Jaballa Hamed Matar. The Committee concludes that the State party has failed in its duty to protect the authors' fathers' lives, in violation of article 6, paragraph 1, of the Covenant.

7.5 As to the alleged incommunicado detention of Izzat Yousef Al-Maqrif and Jaballa Hamed Matar, the Committee recognizes the degree of suffering involved in being held indefinitely without contact with the outside world. It recalls its general comment No. 20 on article 7, which recommends that States parties should make provision against incommunicado detention. It notes that in the instant case they were taken on 13 March 1990 and their fate remains unknown to this day. In the light of the information provided to the Committee by a former fellow inmate of both alleged victims about the widespread use of torture in Abu-Salim prison; the information provided in Jaballa Hamed Matar's undated letter wherein he describes the cruelty practised in the prison; the information on the inhuman conditions at Abu-Salim prison;[12] and, in the absence of information from the State party to contradict the aforementioned information, the Committee concludes that the facts before it reveal a violation of article 7 of the Covenant with regard to Izzat Yousef Al-Maqrif and Jaballa Hamed Matar.

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[10] See communications No. 1422/2005, *El Hassy v. Libyan Arab Jamahiriya* (see footnote 8), para. 6.7; No. 1297/2004, *Medjnoune v. Algeria*, Views adopted on 14 July 2006, para. 8.3; and No. 1804/2008, *Il Khwildy v. Libya*, Views adopted on 1 November 2012, para. 7.2.

[11] See communication No. 1913/2009, *Abushaala v. Libya* (see footnote 8), para. 6.2.

7.6 Regarding the alleged violation of article 9, paragraphs 1 to 4, the Committee notes the authors' information that their fathers were taken away without a warrant and without being informed of the reasons for their arrest, and that they were not brought before a judicial body through which they would have been able to challenge the lawfulness of their detention. In the absence of any pertinent explanation from the State party, the Committee finds a violation of article 9 of the Covenant.[13]

7.7 As regards the authors' claims under article 10, paragraph 1, that their fathers were held incommunicado at Abu-Salim prison, in poor conditions and with a lack of medical care, the Committee reiterates that persons deprived of their liberty may not be subjected to any hardship or constraint other than that resulting from the deprivation of liberty and that they must be treated with humanity and respect for their dignity. In the absence of State party information on the treatment of the authors' fathers in Abu Salim prison and noting what has been reported on the general conditions in that prison,[14] the Committee finds a violation of article 10, paragraph 1, of the Covenant.[15]

7.8 In respect of article 16, the Committee reiterates its established jurisprudence, according to which intentionally removing a person from the protection of the law for a prolonged period of time may constitute a denial of his or her right to recognition as a person before the law if the victim was in the hands of the State authorities when last seen and if the efforts of his or her relatives to obtain access to effective remedies, including judicial remedies (art. 2, para. 3, of the Covenant), have been systematically impeded.[16] In the present case, the State party has not furnished any information about the fate or whereabouts of the disappeared persons, notwithstanding the formal and informal requests submitted to the State party by, inter alia, their relatives. The Committee finds, therefore, a violation of article 16 of the Covenant.

7.9 The authors also invoke article 2, paragraph 3, of the Covenant, which requires States parties to ensure that individuals have accessible, effective and enforceable remedies for asserting the rights enshrined in the Covenant. The Committee reiterates the importance that it accords to States parties' establishment of appropriate judicial and administrative mechanisms for addressing alleged violations of rights under domestic law. The Committee notes that in the present case, no remedy, let alone effective remedy, was available to the victims or the authors of the communication to address their human rights violations. It refers to its general comment No. 31, in which it is stated that failure by a State party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant.[17] In the present case, the Committee notes that the families tried to locate the whereabouts of the two missing persons. Inter alia, relatives of Izzat Yousef Al-Maqrif met with the Libyan Minister of Foreign Affairs in 2007 and submitted a request to the Libyan Intelligence Office in Benghazi concerning the disappearance in 2008, and Hisham Matar met with Seif El-Islam Gaddafi in person on 18 January 2010 in London to inquire about the disappearance of his father. However, all their efforts were to no avail and the State party failed to conduct a thorough and effective investigation into the disappearances. The Committee concludes that the facts before it reveal a violation of article 2, paragraph 3, read in conjunction with article 6, paragraph 1; article 7; article 9; article 10, paragraph 1; and article 16 of the Covenant.

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[12] See E/CN.4/1999/61, para. 448 (see footnote 6).

[13] See communications No. 1640/2007, *El Abani v. Libyan Arab Jamahiriya* (see footnote 8), para. 7.6; and No. 1297/2004, *Medjnoune v. Algeria* (see footnote 10), para. 8.5.

[14] See E/CN.4/1999/61, para. 448 (see footnote 6).

[15] See general comment No. 21 (1992) on the prohibition of torture or cruel, inhuman or degrading treatment or punishment, para. 3, *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40* (A/47/40), annex VI, sect. B; and communications No. 1134/2002, Gorji-Dinka *v.* Cameroon, Views adopted on 17 March 2005, para. 5.2; and No. 1422/2005, *El Hassy v. Libyan Arab Jamahiriya* (see footnote 8), para. 6.4.

[16] See communications No. 1640/2007, *El Abani v. Libyan Arab Jamahiriya* (see footnote 8), para. 7.9; No. 1327/2004, *Grioua v. Algeria*, Views adopted on 10 July 2007, para. 7.8; and No. 1495/2006, *Madaoui v. Algeria*, Views adopted on 28 October 2008, para. 7.7.

7.10 As regards the authors themselves, the Committee notes the anguish and distress caused to the authors by their fathers' disappearance on 13 March 1990, followed by a state of uncertainty that lasted three to four years, at which time they discovered that their fathers had been transferred to Tripoli and held in Abu-Salim prison. The State party's authorities left the authors without any information for more than 20 years – a state of affairs that is still ongoing. The Committee concludes that the facts before it reveal a violation of article 7 of the Covenant read alone and in conjunction with article 2, paragraph 3, with respect to the authors. Having come to this conclusion, the Committee also finds that such suffering caused to the first author reveals a violation of article 24, paragraph 1, read in conjunction with article 7, bearing in mind that he was a minor at the time his father was abducted, and that such suffering and anguish was thus twofold.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it reveal a violation by the State party of articles 6, paragraph 1; 7; 9; 10, paragraph 1, 16. It also reveals a violation of article 2, paragraph 3, read in conjunction with articles 6, paragraph 1; 7; 9; 10, paragraph 1; and 16 of the Covenant with regard to Izzat Yousef Al-Maqrif and Jaballa Hamed Matar. Lastly the Committee finds a violation of article 7, read alone and in conjunction with article 2, paragraph 3, of the Covenant, with respect to the authors, as well as a violation of article 24, paragraph 1, read in conjunction with article 7 with respect to the first author.

9. In accordance with article 2, paragraph 3, of the Covenant, the State party is under an obligation to provide the authors with an effective remedy by, inter alia: (a) conducting a thorough and effective investigation into the disappearance of Izzat Yousef Al-Maqrif and Jaballa Hamed Matar; (b) providing the authors and their families with detailed information on the results of its investigation; (c) releasing Izzat Yousef Al-Maqrif and Jaballa Hamed Matar immediately, if they are still being detained incommunicado; (d) in the event that Izzat Yousef Al-Maqrif and Jaballa Hamed Matar are deceased, handing over their remains to their families; (e) prosecuting, trying and punishing those responsible for the violations committed; and (f) providing adequate compensation to the authors for the violations suffered, as well as to Izzat Yousef Al-Maqrif and Jaballa Hamed Matar, if they are still alive. The State party is also under an obligation to take steps to prevent similar violations in the future.

10. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a

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[17] See general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 40*, vol. I (A/59/40 (Vol. I)), annex III.

violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective remedy when it has been determined that a violation has occurred, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the present Views. The State party is also requested to publish the present Views and to have them widely disseminated.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

II. Communication No. 2007/2010, *X. v. Denmark* (Views adopted on 26 March 2014, 110th session)*

Submitted by:	X (represented by counsel Niels-Erik Hansen)
Alleged victim:	X
State party:	Denmark
Date of communication:	23 November 2010 (initial submission)
Subject matter:	Deportation of the author to Eritrea
Procedural issue:	Substantiation of claims; admissibility ratione materiae
Substantive issues:	Risk of irreparable harm in country of origin
Articles of the Covenant:	7, 14, 18
Article of the Optional Protocol:	5 (para. 2 (b))

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 26 March 2014,

Having concluded its consideration of communication No. 2007/2010 submitted to the Human Rights Committee by X under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The author of the communication is X, an Eritrean national born in 1987 and residing in Denmark. Following the rejection of his asylum claim, he was ordered to leave Denmark immediately. He submits that by forcibly returning him to Eritrea, Denmark would violate his rights under articles 7, 14[1] and 18 of the International Covenant on Civil and Political Rights. He is represented by counsel, Niels-Erik Hansen.

1.2 On 25 November 2010, pursuant to rule 92 of its rules of procedure, the Committee, acting through its Special Rapporteur on new communications and interim measures, requested the State party not to remove the author to Eritrea while the communication was under consideration by the Committee. The author remains in Denmark.

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* The following members of the Committee participated in the examination of the present communication: Mr. Yadh Ben Achour, Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Walter Kälin, Ms. Zonke Zanele Majodina, Mr. Gerald L. Neuman, Sir Nigel Rodley, Mr. Victor Manuel Rodríguez-Rescia, Mr. Fabián Omar Salvioli, Ms. Anja Seibert-Fohr, Mr. Yuval Shany, Ms. Margo Waterval and Mr. Andrei Paul Zlătescu. The text of an individual opinion by Committee member Mr. Neuman is appended to the present Views.

[1] The author refers to article 9 of the Covenant, making reference to the right to a fair trial. The related arguments are therefore dealt with under article 14 of the Covenant.

The facts as submitted by the author

2.1 The author is a citizen of Eritrea and a member of a Christian religious minority, the Pentecostal Movement. Pentecostal Christians refuse to perform military service owing to religious conviction. Although he is an Eritrean national, the author has spent his entire life outside of Eritrea.

2.2 The author was born and raised in Addis Ababa, Ethiopia, and lived there with his mother until he was 13 years old. During the armed conflict between Ethiopia and Eritrea in 1999 and 2000, many Eritreans who lived in Addis Ababa were forced to return to Eritrea. The author's mother was among those forced to leave Ethiopia. The author remained in Addis Ababa and lived in the household of his uncle, who was married to an Ethiopian citizen and therefore was authorized to remain in the country.

2.3 On an unspecified date, the author's uncle was accused by the Ethiopian authorities of helping the Government of Eritrea and he was arrested. The author decided to flee the country and travelled to Denmark via the Sudan and Germany. He arrived in Denmark on 4 February 2010 and immediately applied for asylum.

The complaint

3.1 The author claims that his deportation to Eritrea would constitute a violation of his rights under articles 7 and 18 of the Covenant. The author states that he refuses to bear arms owing to his adherence to the Christian Pentecostal Movement. He asserts that he will therefore be regarded as an opponent of the regime in Eritrea, where all men and women between the ages of 18 and 40 are required to perform military service even if they object on conscientious grounds.[2] The author maintains that because he is of eligible age he would be conscripted if returned to Eritrea. He also argues that the Eritrean authorities subject conscientious objectors to coercion, incarceration without trial (sometimes for up to 14 years) and torture in detention.[3] Accordingly, he submits that "as a member of a banned church community" he risks being persecuted upon arrival at the airport and further risks abuse or torture upon objecting to bear arms.

3.2 The author submits that, if returned, he would be exposed to "very serious abuse", because the Eritrean authorities subject returning asylum seekers to prolonged detention and torture.[4] On a separate ground, the author asserts that draft evaders are "reported to be frequently subjected to torture".[5] The author asserts that he would not be able to demonstrate that he left Eritrea legally, because he has never lived in Eritrea and has no passport or exit stamp from that country. He maintains that he would therefore be apprehended at the airport and subjected to interrogation and detention.

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[2] The author cites *Amnesty International Report 2009* and *2007*; Eritrea Proclamation on National Service No. 82/1995 (23 October 1995).

[3] The author cites the following authorities: Office of the United Nations High Commissioner for Refugees (UNHCR), *UNHCR Guidelines for Assessing the International Protection Needs of Asylum Seekers from Eritrea* (2009), pp. 14–15; Amnesty International, *Amnesty International Report 2007*; United States Department of State, *Country Report on Human Rights Practices: Eritrea* (2006); Jehovah's Witnesses, *Eritrea Country Profile* (October 2008); Jehovah's Witnesses Office of Public Information, *Jehovah's Witnesses in Eritrea* (October 2008); UNHCR, Position paper (April 2009); an unspecified article in *The Guardian* dated 23 May 1995; and an unspecified UNHCR handbook (paras. 169–174).

[4] The author cites page 34 of an unspecified UNHCR report.

[5] The author cites UNHCR, *Guidelines for Assessing the International Protection Needs of Asylum Seekers from Eritrea* (April 2009), pp. 14–15.

3.3 As to the exhaustion of domestic remedies, the author states that the Immigration Service rejected his application and, on 10 July 2010, denied him a residence permit. The author asserts that, on 13 October 2010, the Refugee Appeals Board rejected his appeal and ordered him to leave the country immediately. No further information is provided as to the exhaustion of domestic remedies.

The State party's observations on the admissibility and the merits of the communication

4.1 In its submission of 25 May 2011, the State party first provides additional facts concerning the author's asylum application, which was filed on 4 February 2010 and denied on 29 July 2010. The State party considers that the communication is inadmissible owing to insufficient substantiation. The decision of the Refugee Appeals Board was well-founded, as it was based on an individual assessment of the author's motive for seeking asylum and relied on a wide range of updated sources providing background information. Regarding article 7 of the Covenant, it is unlikely that the author will come into conflict with the authorities if returned to Eritrea. The Appeals Board found that the Eritrean authorities were unlikely to know of the author's religious affiliation insofar as (a) the author had never resided in Eritrea; (b) his activities with the Pentecostal Movement were limited to meeting several times a week with other church members to sing and pray to God, and assisting in collecting money for the Movement; (c) he had limited knowledge of the Movement;[6] and (d) he had not informed anyone in Eritrea, including his mother, of his religious affiliation.[7] The Appeals Board further noted that the author had never been called up for military service and that he had not been in direct contact with the authorities in Eritrea in connection with the exercise of his religion. The Appeals Board drew attention to the assertion that he was baptized as a Pentecostal at the age of 19. The State party considers that the author was unable to give adequate details at the Appeals Board hearing about being baptized at the age of 19 insofar as, despite questioning, he did not mention any details about having water poured over his head at the ceremony. However, the background material cited by the Appeals Board stated that a baptism into the Pentecostal Church normally takes place by full immersion of the body into water and that water must in any case be poured over the head three times during the baptism ceremony. In response to the author's assertion that he will be arrested and imprisoned upon return to Eritrea because he has no passport and exit stamp, illegal departure does not bar an Eritrean national from obtaining a passport at an Eritrean embassy. The State party considers that it has provided substantive and factual arguments to rebut each of the author's allegations with regard to article 7 of the Covenant.[8]

4.2 The State party also considers that the author's implied claim under article 18 of the Covenant (relating to the right to freedom of religion) is inadmissible. Article 18 has no extraterritorial application and does not prohibit a State from removing a person to another State where a risk of a violation of article 18 may exist. A right to conscientious objection, while not explicit under the Convention, may be derived from article 18.[9] However, the author has not substantiated that he will in fact face such a risk upon his return to Eritrea, and the author's affiliation and involvement with the Pentecostal Church appears to be limited.

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[6] The State party refers to the author's following statements, as reported in the Appeals Board decision: "The applicant believed in Penta Costa. That meant believing in one God. The applicant chose the religion when he was 18 years old. The applicant read the Bible, which said something about Jesus. He then became interested in the religion. After he had read about Penta Costa, he was baptized."

[7] The State party notes that the author did state that he had informed his uncle of his membership in the Pentecostal Movement.

[8] The State party cites Human Rights Committee Views, Communication No. 1222/2003 (1 November 2004), *Jonny Robin Byaruhanga v. Denmark*.

4.3 In the alternative, the State party considers that on the merits and following the same arguments, there is no basis for finding that the author's deportation will breach articles 7 or 18 of the Covenant.

The author's comments on the State party's submission

5.1 On 1 September 2011, the author submitted his comments on the State party's submission. The author asserts that his deportation would violate articles 7 and 18 of the Covenant and that he has a well-founded fear of persecution due to religious and imputed political convictions. The author considers that Eritrea fails to regard refusal to perform military service as a form of political protest and that this constitutes persecution due to imputed political opinion. The author also considers that the decision of the Danish Immigration Service was flawed because it rejected the notion that a person may be eligible for refugee status when a country's authorities fail to consider his genuine religious convictions as a valid reason for being excused from required military service.[10] The author considers that the Immigration Service erroneously focused on the undisputed fact that no one in Eritrea knows about the author's religious affiliation. According to the author, the problem arises not from this fact, but rather from the risk the author will face if interrogated by the Eritrean authorities at the airport. The author maintains that the Eritrean authorities will learn of his religious affiliation at that time. He claims that he will be identified as an asylum seeker because he will be escorted by the Danish police. He further argues that, upon seeing that he has no exit permit from Eritrea, the authorities will realize that he has not completed military service, because exit permits are required in Eritrea specifically in order to prevent the departure of persons not having fulfilled the military service requirement. The author considers that the Danish Refugee Appeals Board in fact admitted that the complainant risks forced military service in Eritrea.[11] The author considers that the Appeals Board erroneously concluded that forced military service is not a basis for asylum, regardless of the author's religious affiliation. The author disputes the State party's position that Covenant provisions are always taken into account and argues that the Appeals Board did not consider application of article 18 of the Covenant.

5.2 The author also considers that the State party has violated his right to a fair trial. The author considers that the Appeals Board exceeded its mandate by assessing his credibility and the facts, instead of assessing the correctness of the Immigration Service's decision.[12]

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[9] The State party cites Human Rights Committee general comment No. 22 (30 July 1993) and notes the author's reference to Commission on Human Rights resolution 1989/59 (8 March 1989), reaffirmed, inter alia, in Commission resolutions 1991/65 (6 March 1991) and 1993/84 (10 March 1993).

[10] On this issue, the author cites the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, paras. 172 and 174; the *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Eritrea* (April 2009), pp. 14–15; and recommendation 816 (1977) on the right of conscientious objection to military service (1977), adopted by the Parliamentary Assembly of the Council of Europe at its twenty-ninth ordinary session (5-13 October 1977).

[11] The author cites the Appeals Board decision, which states: "The fact that the applicant risks being called up by the authorities to do his military service to Eritrea cannot in itself lead to a residence permit under section 7 of the Aliens Act, regardless of the applicant's religious affiliation."

[12] In this regard, the author states that the Appeals Board erroneously made a "specific and individual assessment of [the] applicant's motive for seeking asylum combined with the background knowledge on the general situation in the country of origin and any specific details of importance to the case".

The author further considers that, because he has never lived in Eritrea, he has obviously not suffered past persecution there and this fact cannot be considered as determinative of his future risk of persecution in the country. The author considers that the State party's observations mischaracterize the Appeals Board decision. For example, the author states that the State party's observations describe the author's Pentecostal affiliation as being of "extremely limited scope", whereas the Appeals Board described the affiliation as being merely of "limited scope". In addition, the author considers that, contrary to the State party's assertion, the Appeals Board decision never stated in its decision that illegal departure from Eritrea was not a bar to the issuance of Eritrean passports. The author considers that the Immigration Service never asked him about immersion during baptism and that the Appeals Board repeatedly questioned him on this subject without ever alluding to the alleged background information stating that immersion is a universal baptismal practice for Pentecostals. The author further confirms that he was baptised without immersion in Ethiopia. The author considers that although the State party relies on the UNHCR Handbook as a "source of law" with respect to persecution on political or religious grounds, it does not cite the Handbook's most relevant paragraphs.[13] The author also considers that the State party has not provided an adequate factual basis for its position.[14] The author submits that the communication is admissible with respect to claims under articles 7, 14 and 18 of the Covenant.

Additional observations by the State party on admissibility and on the merits

6. In its submissions dated 24 November 2011 and 12 April 2012, the State party responded to the author's comments and provided additional opinions of the Refugee Appeals Board. The Board considers that the author's criticism of the oral hearing before the Board is wholly unfounded, because the hearing was conducted impartially and afforded the author the opportunity to present his case. The Board was under an obligation to make an objectively correct decision and adequately elicit the facts. Although the Appeals Board decision did not make express reference to the Covenant, the international

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[13] The author cites paragraphs 169 to 172 as the most relevant paragraphs of the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (1992): "169. A deserter or draft-evader may also be considered a refugee if it can be shown that he would suffer disproportionately severe punishment for the military offence on account of his race, religion, nationality, membership of a particular social group or political opinion. The same would apply if it can be shown that he has well-founded fear of persecution on these grounds above and beyond the punishment for desertion. 170. There are, however, also cases where the necessity to perform military service may be the sole ground for a claim to refugee status, i.e. when a person can show that the performance of military service would have required his participation in military action contrary to his genuine political, religious or moral convictions, or to valid reasons of conscience. 171. Not every conviction, genuine though it may be, will constitute a sufficient reason for claiming refugee status after desertion or draft-evasion. It is not enough for a person to be in disagreement with his government regarding the political justification for a particular military action. Where, however, the type of military action, with which an individual does not wish to be associated, is condemned by the international community as contrary to basic rules of human conduct, punishment for desertion or draft-evasion could, in the light of all other requirements of the definition, in itself be regarded as persecution. 172. Refusal to perform military service may also be based on religious convictions. If an applicant is able to show that his religious convictions are genuine, and that such convictions are not taken into account by the authorities of his country in requiring him to perform military service, he may be able to establish a claim to refugee status. Such a claim would, of course, be supported by any additional indications that the applicant or his family may have encountered difficulties due to their religious convictions."

[14] Accordingly, the author considers that the State party errs by distinguishing the case at hand from the facts in Human Rights Committee, communication No. 1222/2003, *Jonny Robin Byaruhanga v. Denmark*, decision adopted on 1 November 2004.

human rights conventions are included as central elements in the implementation of the Board's activities. The Board considers that its decision did not discuss the author's religious affiliation in order to discredit his testimony. The Board further notes that it is not bound by any particular rules of evidence and is therefore not obligated to base its decision on specific factual circumstances to the same extent as the Danish Immigration Service. As such, a decision by the Board may uphold an Immigration Service decision for reasons of fact other than those stated in the Service's decisions.

Further comments by the author

7.1 In submissions dated 24 January 2012 and 30 April 2012, the author presented his comments on the State party's additional observations. The author states that the Appeals Board did not question the author's faith and that the Immigration Service should not have done so during the oral hearing with the objective of questioning the author's credibility. In this regard, the author considers that he did not have a fair opportunity to prepare for the Board's line of questioning, which was not neutral or objective. The author considers that the State party only started to question his credibility in its observations, while none of the responsible authorities did so at any stage of the immigration/asylum proceedings. The author also maintains that, because the State party considers the Appeals Board to be a "court", it must ensure a fair trial.[15]

7.2 The author further asserts that the Appeals Board website features outdated memorandums on human rights standards.[16] As an example, the author states that the Board's 2008 memorandum on the Covenant does not mention the importance of article 18 or military service or draft evasion. The author argues that another Board memorandum ignores recent jurisprudence of the European Court of Human Rights indicating that the risk of prolonged punishment for desertion or evasion is within the scope of article 3 of the European Convention on Human Rights,[17] and that countries requiring military service should provide alternative civil service opportunities.[18]

Issues and proceedings before the Committee

Consideration of admissibility

8.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

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[15] The author cites concluding observations of the Committee on the Elimination of Racial Discrimination: "The Committee notes with concern that decisions by the Refugee Board on asylum requests are final and may not be appealed before a court." (CERD/C/DEN/CO/17, para. 13) and "The Supreme Court attached importance to the fact that the Refugee Board is an expert board of court-like character. The Supreme Court has since repeated this position in several other judgments." (CERD/C/DEN/CO/17/Add.1, para. 12).

[16] The author refers to the website www.fln.dk.

[17] The author cites the Board's memorandum entitled "Protection of asylum seekers under the UN Refugee Convention and the European Convention on Human Rights", which in turn refers to EMD case *Said v. The Netherlands* (Application No. 2345/02), judgment of 5 July 2005, confirmed by the Grand Chamber on 5 October 2005.

[18] The author cites the following jurisprudence of the European Court of Human Rights: *Bayatyan v. Armenia* (Application No. 23459/03, 7 July 2011); and *Ercep v. Turkey* (Application No. 43965/04), judgment of 22 November 2011. The author also states that several communications before the Human Rights Committee have been filed against the Republic of Korea, which does not allow civil service as an alternative to military service (citing Human Rights Committee communications Nos. 1321-1322/2-04; 1593-1603/2007; 1642-1741/2007).

8.2 The Committee notes, as required by article 5, paragraph 2 (a), of the Optional Protocol, that the same matter is not being examined under any other procedure of international investigation or settlement.

8.3 The Committee recalls its jurisprudence to the effect that authors must avail themselves of all domestic remedies in order to fulfil the requirement of article 5, paragraph 2 (b), of the Optional Protocol, insofar as such remedies appear to be effective in the given case and are de facto available to the author.[19] The Committee has noted that the author unsuccessfully appealed the negative asylum decision to the Danish Appeals Board and that the State party does not challenge the exhaustion of domestic remedies by the author.

8.4 The Committee notes the State party's argument that the author's claims with respect to articles 7 and 18 of the Covenant should be held inadmissible owing to insufficient substantiation, and its objections with regard to the extraterritorial application of article 18 of the Covenant. However, the Committee considers that the author has adequately explained the reasons for which he fears that forcible return to Eritrea would result in a risk of treatment incompatible with article 7 of the Covenant. The Committee further notes the information provided as to the risks of torture and detention faced by Eritreans who are eligible for conscription. The Committee is, therefore, of the opinion that, for the purposes of admissibility, the author has sufficiently substantiated his allegations under article 7 with plausible arguments in support thereof. As for the allegations concerning a violation of article 18, the Committee considers that they cannot be dissociated from the author's allegations under article 7, which must be determined on the merits.

8.5 As to the author's claim that he was not afforded a fair trial by the Refugee Appeals Board, in breach of article 14 of the Covenant, the Committee refers to its jurisprudence that proceedings relating to the expulsion of aliens do not fall within the ambit of a determination of "rights and obligations in a suit at law" within the meaning of article 14, paragraph 1, but are governed by article 13 of the Covenant.[20] The Committee therefore considers that the author's claim under article 14 is inadmissible *ratione materiae* pursuant to article 3 of the Optional Protocol.

8.6 In the light of the foregoing, the Committee considers that, under article 5, paragraph 2 (b), of the Optional Protocol, the communication is admissible insofar as it raises issues relating to articles 7 and 18 of the Covenant.

Consideration of the merits

9.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as required under article 5, paragraph 1, of the Optional Protocol.

9.2 The Committee considers that it is necessary to bear in mind the State party's obligation under article 2, paragraph 1, of the Covenant to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant, including in the application of its processes for expulsion of non-citizens.[21] The Committee further recalls that States parties are under an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where the necessary and foreseeable consequence of the deportation would be a real risk of irreparable harm, such as that contemplated by article 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed.[22] The Committee has also indicated that the risk must be personal[23] and that there is a high threshold for providing substantial grounds to establish that a real risk of irreparable harm exists.[24] Thus, all relevant facts and circumstances must be considered, including the general human rights situation in the author's country of origin.[25]

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[19] See communication No. 1959/2010, *Warsame v. Canada*, Views adopted on 21 July 2011, para. 7.4; communication No. 1003/2001, *P.L. v. Germany*, inadmissibility decision adopted on 22 October 2003, para. 6.5.

[20] See, inter alia, communication No. 1494/2006, *A.C. and her children, S., M. and E.B. v. The Netherlands*, inadmissibility decision adopted on 22 July 2008, para 8.4: "The Committee refers to its jurisprudence that deportation proceedings did not involve either 'the determination of any criminal charge' or 'rights and obligations in a suit at law' within the meaning of article 14" (citing communication No. 1234/2003, *P.K. v. Canada*, inadmissibility decision of 20 March 2007, paras. 7.4 and 7.5).

9.3 The Committee recalls its jurisprudence that, while important weight should be given to the assessment conducted by the State party, it is generally for the courts of the States parties to the Covenant to evaluate the facts and evidence of a particular case, unless it is found that the evaluation was clearly arbitrary or amounted to a denial of justice.[26] In the present communication, the Committee notes the author's assertions that his lack of an Eritrean passport and exit stamp will make him a target because he will be unable to prove that he has never lived in Eritrea and left the country legally. The Committee further takes note of the author's claim that the Eritrean authorities subject returning failed asylum seekers to ill-treatment. The Committee also notes the State party's assertion that the author may obtain an Eritrean passport at the Eritrean embassy in Denmark. However, the Committee further notes that credible sources indicate that illegal emigrants, failed asylum seekers and draft evaders risk serious ill-treatment upon repatriation to Eritrea and that the author asserts that he would have to refuse to undertake military service on the basis of his conscience.[27] It considers that the State party did not adequately address the concern that the author's personal circumstances, including his inability to prove that he left Eritrea legally, might lead to him being designated as a failed asylum seeker and as an individual who has not completed the compulsory military service requirement in Eritrea or as a conscientious objector. Accordingly, the Committee considers that the State party failed to recognize the author's potential status as an individual subject to a real risk of treatment contrary to the requirements of article 7. Therefore, the Committee is of the view that the author's deportation to Eritrea, if implemented, would constitute a violation of article 7 of the Covenant.

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[21] See general comments Nos. 6 and 20 of the Committee; see also communication No. 1544/2007, *Mehrez Ben Abde Hamida v. Canada*, Views adopted on 18 March 2010, para. 8.2.

[22] General comment No. 31 on the nature of the general legal obligation on States parties to the Covenant (2004), para. 12; see, inter alia, communication No. 1544/2007, *Mehrez Ben Abde Hamida v. Canada*, Views adopted on 18 March 2010, para. 8.7; communication No. 692/1996, *A.R.J. v. Australia*, Views adopted on 28 July 1997, para. 6.14.

[23] Communication No. 692/1996, *A.R.J. v. Australia*, Views adopted on 28 July 1997, para. 6.6.

[24] Communication 1833/2008, *X. v. Sweden*, Views adopted on 1 November 2011, para. 5.18.

[25] Ibid.

[26] See, inter alia, ibid. and communication No. 541/1993, *Errol Simms v. Jamaica*, inadmissibility decision adopted on 3 April 1995, para. 6.2.

[27] See *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Eritrea* (April 2009): "Draft evaders/deserters are reported to be frequently subjected to torture" (p. 14); "Eritreans who are forcibly returned may, according to several reports, face arrest without charge, detention, ill-treatment, torture or sometimes death at the hands of the authorities. They are reportedly held *incommunicado*, in over-crowded and unhygienic conditions, with little access to medical care, sometimes for extended periods of time … UNHCR is aware of at least two Eritrean asylum-seekers who have arrived in Sudan having escaped from detention following deportation from Egypt in June 2008. Eritreans forcibly returned from Malta in 2002 and Libya in 2004 were arrested on arrival in Eritrea and tortured. The returnees were sent to two prisons on Dahlak Island and on the Red Sea coast, where most are still believed to be held *incommunicado*. There are also unconfirmed reports that some of those returned from Malta were killed. In another case, a rejected asylum-seeker was detained by the Eritrean authorities upon her forcible return from the United Kingdom. On 14 May 2008, German immigration authorities forcibly returned two rejected asylum-seekers to Eritrea. They were reportedly detained at Asmara airport upon arrival and are being held *incommunicado*, and believed to be at risk of torture or other ill-treatment" (pp. 33–34).

9.4 In the light of its findings on article 7, the Committee will not further examine the author's claims under article 18 of the Covenant.

9.5 The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the author's expulsion to Eritrea would, if implemented, violate article 7 of the Covenant.

9.6. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including a full reconsideration of the author's claim regarding the risk of treatment contrary to article 7 if he is returned to Eritrea, taking into account the State party's obligations under the Covenant.

9.7. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in the event that a violation has been established, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Appendix

Individual opinion of Committee member Gerald L. Neuman (concurring)

I concur fully in the Committee's Views. I write separately in the hope of shedding some light on the legal issue the Committee avoids in paragraphs 8.4 and 9.4 of the Views, regarding the author's effort to bring his situation within a non-refoulement obligation derived directly from article 18 of the Covenant. The State party argues that this claim should be dismissed as inadmissible, because the obligation not to transfer an individual to a country where a Covenant right would be violated applies only to article 6 (protecting the right not to be deprived of life) and article 7 (prohibiting torture and cruel, inhuman or degrading treatment or punishment). The Committee addresses the admissibility of the claim obliquely, finding that it "cannot be dissociated from the author's allegations under article 7 of the Covenant", which are clearly admissible and provide the basis on which the Committee decides. This formulation has been used by the Committee repeatedly to avoid resolving the question whether such non-refoulement obligations can be derived from provisions of the Covenant other than articles 6 and 7.

The argument that the author should not be sent to Eritrea because of the real risk that his right to freedom of thought, conscience and religion under article 18 would be violated there resembles the claim of refugees not to be sent back to a country where they face persecution on account of religion, under article 33 of the 1951 Convention relating to the Status of Refugees (also incorporated in its 1967 Protocol).[a] On the facts of the present case, given the author's justified fear of ill-treatment, the threatened harm undoubtedly rises to the level of "persecution" within the meaning of the Refugee Convention.

The article 18 argument therefore could be supported either by interpreting the Covenant in light of the Refugee Convention, or by the abstract argument that a State's duty not to violate an individual's right under the Covenant always includes the duty not to send the individual to a country where there is a real risk that the individual's right will be violated. Both of these lines of argument have a superficial attraction, but both raise serious questions on closer inspection.

Thus far, when the Committee has recognized derived non-refoulement obligations under the Covenant, it has defined them as absolute. The State cannot send the individual to the other country so long as a "real risk" of the violation of article 6 or 7 exists, regardless of the particular circumstances, including dangers posed by the individual within the sending country. This absolute obligation is modelled on the absolute and non-derogable prohibition on refoulement to torture in article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

The non-refoulement obligation under the Refugee Convention, however, is more limited. First, it is circumscribed by the definition of "refugee", which contains exclusion clauses, some of which deny individuals protection as a "refugee" because of reprehensible actions such as war crimes, crimes against humanity and serious non-political crimes.[b]

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[a] See UNHCR, "Guidelines on international protection No. 10: Claims to refugee status related to military service within the context of article 1A (2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees" (HCR/GIP/13/10) (2013).

[b] See ibid., para. 2, explaining that the Guidelines on claims to refugee status related to military service do not address the application of the exclusion clauses, which "will need to be properly assessed"

Second, article 33 of the Refugee Convention itself contains an exception clause, specifically making the prohibition on refoulement inapplicable to individuals, even recognized refugees, who have been convicted of particularly serious crimes or pose a danger to the security of the sending State.[c] Thus the Refugee Convention takes into account both the interests of the person who fears persecution and other important interests of States and their residents.

If the Committee were to recognize a non-refoulement obligation under article 18, it would need to decide whether that obligation is absolute like the obligation under article 7, or subject to exceptions like the obligation under the Refugee Convention, and if the latter, then how the interests of the person resisting return and the rights of others should be reconciled. As a complicating factor, article 18 has multiple subcomponents, some of which involve rights understood as absolute (such as the right to have a religion or belief) and some of which are expressly subject to limitation (such as the right to manifest one's religion or belief in practice). One might question why the prohibition on return would be absolute when the underlying right itself is not.

Meanwhile, the Committee would also need to decide what degree or kind of interference with rights under article 18 rises to the level justifying the implication of a non-refoulement obligation. Under the Refugee Convention, the threatened interference with freedom of religion must rise to the level of "persecution" for the victim to claim refugee status.[d] Not every violation of article 18 would be severe enough to justify a prohibition against refoulement under the Covenant. It may be doubted, for example, that discriminatory funding of private religious schools, burdens of seeking exemption from Christian education in public schools, or discriminatory public school dress codes would require a State party to avoid returning claimants to Canada, Norway and France (respectively), despite the fact that the Committee has found violations of article 18 on each of those grounds.[e]

Those examples also suggest the fallacy of the abstract argument that a State's duty not to violate a right always entails an obligation not to send an individual to a second State where there is a real risk that the second State will violate the right. The Committee's general comment No. 31 speaks of "irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant" as the kind of injury that is severe enough to justify a non-refoulement obligation. Some violations of the Covenant have only financial consequences and are easily reparable; but beyond that, the language of the general comment suggests that it is referring to irreparability in a deeper sense. It is difficult to imagine that article 25 of the Covenant forbids sending a politician back to a country merely because there is a "real risk" — or even a certainty — of an unreasonable restriction on the politician's right to stand as a candidate for the national legislature, although I recognize that the loss of that opportunity cannot be fully repaired. It is also unlikely that a notorious systemic violation of article 25, such as the open failure of a State to hold genuine periodic elections, entails a

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(citing UNHCR "Guidelines on international protection No. 5: Application of the exclusion clauses: Article 1F of the 1951 Convention relating to the Status of Refugees" (HCR/GIP/03/05) (2003).

[c] More precisely, article 33(2) denies the benefit of the prohibition on refoulement in article 33(1) to "a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country".

[d] I leave aside here the fact that the Refugee Convention also requires that the feared persecution be based on enumerated grounds of race, religion, nationality, political opinion, or membership of a particular social group.

[e] See communication Nos. 694/1996, *Waldman v. Canada*, Views adopted on 3 November 1999; 1155/2003, *Leirvåg v. Norway*, Views adopted on 3 November 2004; 1852/2008, *Bikramjit Singh v. France*, Views adopted on 1 November 2012.

non-refoulement obligation for the benefit of all its citizens in other States. The abstract argument that all potential violations of the Covenant entail non-refoulement obligations is untenable.

In the present case, the author's religious convictions are relevant to the question whether he would face a real risk of treatment contrary to article 7 if he were returned to Eritrea. Taking them into account in that manner provides a sufficient basis for the Committee's decision.

[Done in English. Subsequently to be issued also in Arabic, Chinese, French, Russian and Spanish as part of the present report.]

JJ. Communication No. 2094/2011, *F.K.A.G. et al. v. Australia* (Views adopted on 26 July 2013, 108th session)* **

Submitted by:	F.K.A.G. et al. (represented by counsel, Ben Saul)
Alleged victims:	The authors
State party:	Australia
Date of communication:	28 August 2011 (initial submission)
Subject matter:	Indefinite detention of persons in immigration facilities
Procedural issue:	Exhaustion of domestic remedies; inadmissibility *ratione materiae*; lack of substantiation
Substantive issues:	Right to liberty; right to protection from inhuman treatment; right to family life; right of children to protection
Articles of the Covenant:	Articles 7, 9 (paras. 1, 2 and 4), 10 (para. 1), 17 (para. 1), 23 (para. 1) and 24 (para. 1)
Article of the Optional Protocol:	Articles 2, 3 and 5 (para. 2 (b))

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 26 July 2013,

Having concluded its consideration of communication No. 2094/2011, submitted to the Human Rights Committee on behalf of F.K.A.G. et al. under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the authors of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The authors of the communication are 37 persons held in Australian immigration facilities.[1] They are all Sri Lankan citizens of Tamil ethnicity except one author, who is a

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* The following members of the Committee participated in the examination of the present communication: Mr. Yadh Ben Achour, Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Walter Kälin, Ms. Zonke Zanele Majodina, Mr. Kheshoe Parsad Matadeen, Mr. Gerald L. Neuman, Sir Nigel Rodley, Mr. Victor Manuel Rodriguez-Rescia, Mr. Fabián Omar Salvioli, Ms. Anja Seibert-Fohr, Mr. Yuval Shany, Mr. Konstantine Vardzelashvili and Ms. Margo Waterval.

The text of an individual opinion by Committee member Sir Nigel Rodley is appended to the present Views.

** Appendix I is being reproduced in the language of submission only.

[1] A list of the authors can be found in appendix I.

Myanmarese citizen of Rohingya ethnicity. They claim violations of their rights under articles 7, 9 (paras. 1, 2 and 4), 10 (para. 1), 17 (para. 1), 23 (para. 1) and 24 (para. 1). The authors are represented by counsel.

1.2 On 4 July, 16 November and 29 November 2012, following information received from counsel,[2] the Special Rapporteur on new communications and interim measures, acting on behalf of the Committee, requested the State party to adopt all necessary measures to ensure the physical and mental well-being of the authors, protect them from the risk of self-harm and provide them with support to alleviate the high level of anxiety resulting from prolonged detention, so as to avoid irreparable damage to them. The Special Rapporteur also requested the State party to carry out an independent psychiatric examination of two of the authors.[3]

The facts as submitted by the authors

2.1 Thirty-one of the authors, including two children, entered Australian territorial waters on various boats between March 2009 and March 2010. They were apprehended at sea and were first disembarked in Australia at Christmas Island. They were taken to immigration detention facilities, under section 189 (3) of the Migration Act 1958, according to which Australian authorities must detain a person who is an "unlawful non-citizen" in an "excised offshore place". They did not have valid visas to enter Australia. One of the authors is a minor child born in detention in Australia.[4]

2.2 Five of the authors (S.R. (author 13), A.R. (author 14), A.R. (author 15), S.S. (author 22) and S.Y. (author 34)) were disembarked in Indonesia after having been rescued at sea by the Australian customs vessel *Oceanic Viking*. Australia then agreed with Indonesia that it would receive them in Australia on 29 December 2009 on "special purpose" visas. Upon arrival at Christmas Island by plane, the visas expired and they became "unlawful non-citizens" in the "migration zone" who did not enter at an "excised offshore place". They were entitled to apply for protection visas and were placed in immigration detention pending a permanent resolution of their status.

2.3 The authors were subsequently transferred to a range of immigration detention facilities. The authors belonging to the group of 31 were later recognized by the Department of Immigration and Citizenship (DIAC) as refugees for whom return to their countries of origin was unsafe. The five from the *Oceanic Viking* were recognized as refugees by the Office of the United Nations High Commissioner for Refugees (UNHCR) but sought to apply for permanent protection in Australia.

2.4 All adult authors were subsequently refused visas to remain in Australia following adverse security assessments made by the Australian Security Intelligence Organisation (ASIO). None of the authors were provided with a statement of reasons for these adverse security assessments. The three children were granted protection visas.

2.5 The authors are unable to challenge the merits of their security assessment.[5] The only avenue available to them is a review before the federal courts for "jurisdictional error" (error of law), which may include the denial of procedural fairness. However, such review is not a merits review of the factual and evidentiary basis of the ASIO decision. Since the grounds of the ASIO assessments have not been disclosed, the authors have no way of determining whether there exist any jurisdictional errors.

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[2] See paragraph 2.7 below.

[3] P.S. and K.T. (authors 29 and 30).

[4] V.R. (author 16).

[5] The letters received by the authors regarding the outcome of their security assessment indicate that they "do not have a right to seek merits review of the ASIO assessment. This is because under the *Australian Security Intelligence Organisation Act 1979*, only certain categories of persons are able to seek merits review of a security assessment and you do not come within any of those categories".

2.6 As they have been refused a visa, the authors are being kept in detention for the purpose of removal, under section 198 of the Migration Act. However, they do not wish to return voluntarily to their countries of nationality and the State party has not informed them of any intention to remove them to these countries. Nor has the State party informed them that any third country has agreed to accept them, or that active negotiations for such purpose are under way. No third country is obliged to admit them. It is also highly improbable that any third country would accept them when they have been assessed by Australia as a risk to security.

2.7 In subsequent letters counsel informed the Committee about the escalating risk to the mental and physical health of the authors in detention. In May 2012, K.N. (author 11) took an overdose of antidepressant medication and had to be hospitalized. On 6 May 2012, S.Y. (author 34) was found attempting to self-harm with an electrical power cable. K.S. (author 27) attempted suicide on 8 November 2012. His actions were prompted by his concern about the treatment of his brother, P.S. (author 29), who is mentally ill and is not getting adequate treatment. K.T. (author 30) attempted suicide on 15 and 24 November 2012.[6]

The complaint

3.1 The authors claim that their detention violates articles 9 (paras. 1, 2 and 4), 7, 10 (para. 1), 17 (para. 1), 23 (para. 1) and 24 (para. 1) of the Covenant.

Article 9, paragraph 1

3.2 The authors' detention is arbitrary or unlawful under article 9, paragraph 1, in two separate phases: first, before the decision by Australia to refuse them refugee protection and second, after the refusal decision by Australia and pending their removal from Australia.

3.3 The State party did not provide any lawful, individualized justification for detaining the authors upon their arrival to determine whether each of them presented a risk of absconding or lack of cooperation, or posed a prima facie security threat. All were automatically detained merely because they were unlawful non-citizens in an excised offshore place. The statutory framework does not permit an individual assessment of the substantive necessity of detention.

3.4 In the absence of any substantiation of the need to individually detain each author, it may be inferred that such detention pursues other objectives: a generalized risk of absconding which is not personal to each author; a broader aim of punishing or deterring unlawful arrivals; or the mere bureaucratic convenience of having such persons permanently available. None of these objectives provides a legitimate justification for detention.

3.5 As to the post-refusal stage, the mere assertion that a person poses a security risk cannot satisfy the requirements of article 9.[7] The secret basis of the security assessment renders it impossible to evaluate the justification for detention and constitutes a denial of due process of law. It can only be assumed that the assessments relate to their suspected conduct prior to their entry to Australia. However, if the State party possesses evidence to suspect that any of the authors has committed a crime in the context of the armed conflict in Sri Lanka, or by association with an organization such as the Liberation Tigers of Tamil Eelam, such crimes can be prosecuted under Australian law. Furthermore, any prior activities of the authors in Sri Lanka cannot easily establish that the authors present a relevant risk to the Australian community. The provenance of information about them may also be unreliable, particularly if the Australian authorities have relied upon intelligence provided by the Government of Sri Lanka.

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[6] See paragraph 1.2 above. On 26 February 2013, in response to the Committee's concerns, Australia provided information about the application to the authors concerned of various policies, which include a psychological support programme, educational and recreational activities and the assignment of a Personal Officer to meet regularly with them and help with any queries.

[7] The letters received from DIAC informing the authors about the security assessment outcome indicate: "ASIO assesses [name of author] to be directly (or indirectly) a risk to security, within the meaning of section 4 of the Australian Security Intelligence Organisation Act 1979. ASIO therefore

3.6 The State party has not utilized any alternative means to detention, or demonstrated that such means would be inadequate or inappropriate in meeting security concerns. Furthermore, Australian law does not provide any legally enforceable mechanism for the periodic review of the grounds of detention or a maximum period of detention. Detention simply persists until a person receives a visa or is removed from Australia. In similar cases, the High Court of Australia has confirmed the validity of indefinite immigration detention.

3.7 The security assessment by Australia operates as an additional, unilateral ground for excluding refugees which is not authorized under the Convention relating to the Status of Refugees (Refugee Convention). Refugees can be excluded from protection only if they are suspected of committing the serious conduct specified under article 1F, or pose risks under article 33, paragraph 2, of the Convention, and not where they fall within the wide meaning of "security" under Australian law. Their detention cannot be justified under international refugee law if neither article 1F nor article 33, paragraph 2, applies.

Article 9, paragraph 2

3.8 None of the authors were informed by the authorities of the substantive reasons for their detention. At most, they were made aware that they were detained because they were offshore entry persons and unlawful non-citizens liable to detention under the Migration Act.

Article 9, paragraph 4

3.9 The detention cannot be challenged under Australian law and no court has jurisdiction to assess its necessity, including by reference to risk factors pertaining to

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recommends that any application for a visa by [name of author] be refused". Section 4 of the Act defines "security" as:

(a) the protection of, and of the people of, the Commonwealth and the several States and Territories from:

(i) espionage;

(ii) sabotage;

(iii) politically motivated violence;

(iv) promotion of communal violence;

(v) attacks on Australia's defence system; or

(vi) acts of foreign interference;

whether directed from, or committed within, Australia or not; and

(aa) the protection of Australia's territorial and border integrity from serious threats; and

(b) the carrying out of Australia's responsibilities to any foreign country in relation to a matter mentioned in any of the subparagraphs of paragraph (a) or the matter mentioned in paragraph (aa).

See also para. 6.4 below.

individual authors. The Migration Act requires the mandatory detention of offshore entry persons and does not provide for individualized assessments.

3.10 The Australian courts can only conduct a purely formal review of whether the authors are offshore entry persons, whether they have been granted a visa or not, or whether they are being held pending removal to another country. The courts can review administrative decisions on limited legal grounds of jurisdictional error, including denial of procedural fairness, but not the substantive necessity of detention.

3.11 Since the reasons for the adverse security assessments were not disclosed, it is impossible for the authors to identify whether any errors of law were made by ASIO. Furthermore, the courts have accepted that they lack the expertise to evaluate security information, and their review of the evidence in such cases remains largely formal and ineffective. Even if the authors could commence judicial review proceedings, ASIO could claim "public interest immunity" to preclude the authors from challenging any adverse security evidence in court, as ASIO has done in other Federal Court cases involving adverse security assessments concerning non-citizens.

Articles 7 and 10 (para. 1)

3.12 In combination, the arbitrary character of their detention, its protracted and/or indefinite duration and the difficult conditions in the detention facilities are cumulatively inflicting serious, irreversible psychological harm upon the authors, contrary to articles 7 and 10 (para. 1) of the Covenant. The difficult conditions of detention include inadequate physical and mental health services; exposure to unrest, violence and punitive legal treatment; risk of excessive use of force by the authorities; and witnessing or fearing incidents of suicide or self-harm by others. No domestic remedies, including constitutional remedies, are available in this regard.

3.13 Different institutions, including the Australian Human Rights Commission and medical bodies, have expressed concerns in connection with the mental health of persons detained in immigration facilities. The impact of detention on the authors' mental health is exacerbated by the physical conditions of the detention facilities. The Australian Human Rights Commission has expressed concern, for instance, at the extremely restrictive environment at Villawood Immigration Detention Centre and at the Northern Immigration Detention Centre at Darwin, with the use of extensive high wire fencing and surveillance. Christmas Island Immigration Detention Centre was similarly described as prisonlike. The Commission has also expressed concern about the possibly excessive use of force in detention facilities and the inadequate mental and physical health-care services.

Articles 17 (para. 1), 23 (para. 1) and 24 (para. 1)

3.14 The five members of the R. family (authors 13–17) claim that their protracted detention constitutes also a violation of articles 17 (para. 1), 23 (para. 1) and 24 (para. 1), as it interferes with family life and is not compatible with the State party's obligation to protect the family and children. The family is housed in a separate facility at Villawood — Sydney Immigration Residential Housing. The detention of the children is not justified. Given their age (1, 4 and 7 years old at the time of submission), they pose no security, health or absconding risks. While the residential housing facility at Villawood is preferable to the main detention compound, it is still a closed facility from which children and their families are not free to come and go. According to mental health professionals, the detention of infants and children has immediate, and is likely to have longer-term, effects on their development and their psychological and emotional health.

3.15 All five authors were extensively assessed by a psychiatrist in a report of 1 November 2010, which was provided to the Minister for Immigration and Citizenship. The report indicates that S.R. (author 13) is seriously depressed and would fulfil standard criteria for major depressive disorder. She also has some features of post-traumatic stress disorder. Her depressive state can be appropriately understood in terms of the severe stressors the members of the family have experienced since their detention and the uncertainty about their future. The three-year-old son may be abnormally sad and anxious and could be malnourished. His normal development has been seriously disrupted. All three children might have difficulties in the future if they continue to live in detention, with restraints on friendships when not at school, on contact with extended family and on extracurricular activities at school.

3.16 The detention of the R. family constitutes an interference in family life because it disrupts the ordinary family interactions, freedoms and relationships, including the ability to determine their own place of residence, living conditions, choice of co-habitants, family activities outside the home, and relationships in the community. This interference is not justified by any legitimate aim, because their protracted detention violates articles 9, 7 and 10 of the Covenant.

3.17 Since August 2011, S.S. (author 20), has been separated, by detention at Villawood, from his wife and minor child, who are living in the community in Sidney. Their separation is causing serious stress and anxiety for the family, in circumstances where detention is indefinite and non-reviewable and cannot be adequately mitigated by periodic visitation of the author by his family. The wife finds it extremely difficult integrating into the community without her husband and suffers stress-related health problems as a result. The wife and child are housed a significant distance from the detention facility, making their daily visits onerous, time consuming and expensive. Where the author's detention is unlawful, there is no lawful justification for the interference in family life caused by it and the State party is responsible for the violation of articles 17, 23 (para. 1) and 24 (para. 1) of the Covenant.[8]

3.18 For the reasons indicated above, there is no binding domestic remedy available to the authors to prevent the arbitrary interference in their family life or to compel the protection of their families or children in the manner required by articles 23 (para. 1) and 24 (para. 1).

Remedies sought

3.19 The State party should, inter alia, acknowledge the violations of the Covenant, grant the authors immediate release, apologize to them and provide them with adequate compensation, including for the mental distress and psychological suffering. Where the State party believes it is necessary to detain the authors, it should provide an individual assessment of the necessity; consider less invasive alternatives to detention; provide a procedure for the periodic independent review of the necessity of continued detention; and provide for the effective judicial review of that necessity.

3.20 In terms of the guarantees of non-repetition, Australian law should be amended to: eliminate mandatory detention; require an individual assessment of the necessity of detention; inform detainees of the substantive reasons for their detention; require periodic independent review of the necessity of detention; require consideration of less invasive alternatives to detention; provide for substantive and effective judicial review of detention and of adverse security assessments; and provide for measures for the more effective protection of family and children's rights.

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[8] In one of the submissions to the Committee it is indicated that this family had been speaking seriously of committing to a mutual "suicide pact" because of the acute stress resulting from the protracted detention of Mr. S. and his separation from his family.

State party's observations on admissibility

4.1 On 5 December 2012, the State party argued that all the claims are inadmissible. It stated that on 15 October 2012 the Government announced that it would appoint an independent reviewer to review adverse security assessments issued in relation to asylum seekers owed protection obligations who are in immigration detention. The reviewer will examine all materials used by ASIO (including any new material referred to ASIO by the affected individual) and report his or her findings to the Attorney General, the Minister for Immigration and Citizenship and the Inspector-General of Intelligence and Security. The reviewer will also conduct a periodic review of adverse security assessments every 12 months. Both the initial and periodic review mechanisms will be made available to the authors of the communication, thus providing them with access to an open and accountable decision-making process in relation to security assessments.

4.2 Given that the authors have been found to be refugees they are owed protection obligations under international law and cannot be returned to their countries of origin. The Government is exploring solutions for them, including resettlement in a third country or safe return to their country of origin when the risk of harm no longer exists or when reliable and effective assurances can be received from the home country. However, it is not appropriate for individuals who have an adverse security assessment to live in the community while such solutions are sought.

Non-exhaustion of domestic remedies

4.3 With reference to articles 7, 9 (paras. 1 and 4), 10 (para. 1), 17 (para. 1), 23 (para. 1) and 24 (para. 1), the authors have not exhausted domestic remedies. It was open to each of the authors to seek judicial review of the decision regarding detention in the Federal Court or High Court of Australia and, as part of the proceedings for judicial review, seek information regarding the basis for the security assessment. The authors have not sought such review, with the exception of P.S. (author 29), who made an application to the High Court, but subsequently settled with the Government of Australia and discontinued his case, and Y.R. (author 17), who commenced litigation in the High Court in May 2012 challenging his adverse security assessment and the legality of his detention.[9] The High Court will consider whether procedural fairness was afforded to Y.R. in the issuing of an adverse security assessment; whether section 189 of the Migration Act authorizes his detention and whether it is inherent in the separation of powers in the Constitution that long-term detention of a person is lawful only if ordered by a Court. There is no date for the judgement as yet. The outcome of a successful application for judicial review of the adverse security assessment could be the reconsideration by ASIO.

4.4 A recent case (*Plaintiff M47/2012 v. Director General of Security and Ors*) further demonstrates that there are domestic remedies still available to the authors. This case was brought by a person who arrived in Australia as part of the *Oceanic Viking* group. The High Court considered the reasons for the adverse security assessment which ASIO provided to Plaintiff M47 and the opportunity he had been given to address the critical issues upon which the security assessment decision was based. The High Court found that ASIO provided procedural fairness to Plaintiff M47 based on the circumstances of his particular case. However, it found a regulation made under the Migration Act invalid to the extent that it applied a criterion which prevented the grant of a protection visa to a refugee if that refugee was the subject of an adverse security assessment. The effect is that the refusal to grant Plaintiff M47 a protection visa was not made according to law and DIAC would need to reconsider his application for a protection visa. The Court found Plaintiff M47's continuing detention was valid for the purpose of determining his application for a protection visa. The *M47* judgement could be applied to those authors who arrived on the *Ocean Viking* (were they to submit protection visa applications, which they have not done to date). However, it does not affect those authors who are offshore entry persons under the Migration Act, as they are subject to a bar on making valid visa applications under section 46A of the Migration Act.

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[9] *Plaintiff S138/2012 v. Director-General of Security and Ors.*

4.5 The State party disagrees with the authors' contention that judicial review proceedings are not worth pursuing as Australian courts are limited to conducting a review on the limited grounds of jurisdictional error and are not able to review the substantive merits of the necessity of detention. The fact that the *M47* case was brought before the High Court and directly challenged the lawfulness of detention of persons in the authors' circumstances shows that an effective remedy is still available to the authors in the same circumstances.

4.6 The child authors (authors 14, 15 and 16), through their parents, have failed to make use of all administrative avenues that offer them a reasonable prospect of redress.

Inadmissibility ratione materiae

4.7 Any claims in the communication based on the Refugee Convention are inadmissible *ratione materiae* as incompatible with the provisions of the Covenant.

4.8 Claims under article 9, paragraph 2, are also inadmissible *ratione materiae*, as the authors were not "arrested". The term "arrest" should be understood as referring to the act of seizing a person, in connection with the commission or alleged commission of a criminal offence, and taking that person into custody. The ordinary meaning of the term "arrest" does not extend to the placing of an asylum seeker into administrative detention for the purposes of undertaking health, security and identity checks.

Lack of substantiation

4.9 Claims under articles 7 and 10 (para. 1) should be declared inadmissible for lack of substantiation. The authors made general submissions about the conditions of detention. However, they provided no evidence indicating that the treatment of each or any author in detention has risen to a level of humiliation or debasement beyond the fact of detention itself in their own particular circumstances.

Author's comments on the State party's observations on admissibility

5.1 On 21 February 2013, the authors provided comments on the State party's observations on admissibility.

5.2 The authors reject the contention that domestic remedies have not been exhausted. Formal legal rights to judicial review of both detention and adverse security assessments exist, but the review is practically ineffective and/or too narrow in scope to protect Covenant rights. As regards review of detention, the courts may test whether a detainee is an offshore entry person, but have no power to consider the substantive necessity of detention. Further, jurisprudence of the High Court[10] has established that indefinite immigration detention is lawful in domestic law. Under the requirement of exhaustion of domestic remedies authors cannot be expected to contest recent and final jurisprudence of the High Court. As regards judicial review of adverse security assessments, the authors are not adequately provided with the reasons or evidence sustaining their assessments, and so are unable to identify legal errors that would constitute a reviewable ground. Commencing speculative proceedings is considered an abuse of court process.

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[10] See *Al-Kateb v. Godwin* (2004).

5.3 There are also practical considerations impeding judicial review, namely, it is expensive for refugees who are in detention, lack any income and are not entitled to legal aid. As for the *M47* case, the ability of that refugee to commence proceedings shows only that that particular person could identify legal errors, as a greater degree of disclosure of information was provided to him than to the authors in the present communication.

5.4 Furthermore, the *M47* case concerned a refugee from the *Oceanic Viking* who lawfully entered Australia on a special purpose visa. His situation is thus different from that of the majority of authors in the present communication, who entered Australia unlawfully by boat and are by law ineligible to apply for a protection visa. At most, the High Court ruling may apply to the five authors from the *Oceanic Viking*. Still, the High Court upheld the lawfulness of Plaintiff M47's continuing detention. The legal basis of it simply switched from detention pending removal to detention pending a (valid) new security assessment and a reconsideration of his protection visa application. This demonstrates that the Courts are not empowered to release the authors from detention other than on narrow technical grounds.

5.5 Regarding the child authors, they have the right to live in the community. However, this does not render their claims inadmissible. It is in their best interest both not to be separated from their parents and not to reside in detention. Any national security threat posed by the parents (which they deny) could be addressed by applying security measures to the parents in the community, such as surveillance, reporting, assurances, Global Positioning System (GPS) tracker bracelets or restrictions on communication and residency.

5.6 Concerning the admissibility of allegations regarding violations of the Refugee Convention, the authors are not requesting the Committee to find direct or autonomous breaches of this Convention. Rather, they request the Committee to interpret article 9, paragraph 1 in accordance with refugee law, which should be considered as *lex specialis* here.

5.7 As for the objection that article 9, paragraph 2, is confined to situations of criminal arrest, the authors contend that this provision shares in the protective purpose of article 9 to prevent arbitrary arrest or detention, not just criminal arrest or detention.

5.8 The authors have submitted sufficient information for purposes of admissibility regarding claims under articles 7 and 10 and can submit more. Each author is willing to provide personal statements detailing their experience of detention and its impacts upon them. Further psychiatric reports for various authors are also available upon request.

5.9 With respect to the appointment of an independent reviewer of adverse security assessments, the authors consider this as an improvement; however, it remains procedurally inadequate. First, the reviewer's findings are not binding – they are only recommendations to ASIO. Secondly, there remains no minimum content of disclosure in all cases, which limits a refugee's ability to effectively respond. In a given case, ASIO may still determine that it is not possible to disclose any meaningful reasons to a person and this will also prevent disclosure by the reviewer. Refugees thus may lawfully continue to receive no notice of allegations prior to decisions being made.

State party's observations on the merits

6.1 On 5 December 2012, the State party argued that the claims are without merit for the following reasons.

Article 9, paragraph 1

6.2 The authors are unlawful non-citizens detained under the Migration Act. Their detention is therefore lawful. The High Court of Australia has found the pertinent provisions of the Migration Act to be constitutionally valid. Asylum seekers are placed in immigration detention if they are: (a) unauthorized arrivals, for management of health, identity and security risks to the community; (b) unlawful non-citizens who present unacceptable risks to the community; and (3) unlawful non-citizens who repeatedly refuse to comply with their visa conditions.

6.3 The length and conditions of detention, including the appropriateness of both the accommodation and the services provided, are subject to regular review. Detention is not limited by established time frames but depends on individualized assessments of risks to the community. These assessments are completed as expeditiously as possible. The determining factor is not the length of the detention but whether the grounds for it are justifiable.

6.4 ASIO has individually assessed each adult author and determined, in application of section 4 of the Australian Security Intelligence Organisation Act, that granting a permanent visa to them would be a risk for one or more of the following reasons:

- Posing security threats to Australia and Australians, including politically motivated violence, promoting community violence, or threats to the territorial and border integrity of Australia;
- Providing a safe haven for any organization(s) to which they belong to conduct attacks against their government either in Australia or overseas; and/or
- Potentially providing a safe haven for individuals or terrorist organizations to engage in terrorist activities and terrorist financing within Australia.

6.5 Providing people with the classified details underpinning adverse assessments would undermine the security assessment process and compromise the security of Australia. It would also put ASIO sources at risk and erode the capabilities on which ASIO relies to fulfil its responsibilities.

6.6 The detention of the adult authors is a proportionate response to the security risk they were individually found to pose. As for the three child authors, their best interests were considered, including residence in the community. In circumstances where the family decided to stay together in detention facilities, the children have been provided with appropriate and supportive services and facilities. They live in immigration residential housing and are free to attend school, outings and other organized activities in order for them to live with as limited restriction and as consistently with their status as lawful non-citizens as practicable, while solutions for the family are explored.

6.7 The lawfulness of decisions made under the ASIO Act is subject to judicial review. In addition, the Inspector-General of Intelligence and Security may inquire into the legality, propriety, effectiveness and appropriateness of ASIO in its work relating to the security assessment of non-citizens.

Article 9, paragraph 2

6.8 Should the Committee conclude that the authors were "arrested" for the purposes of article 9, paragraph 2, the State party submits that this provision has not been breached. As is the usual practice, all authors arriving at Christmas Island were informed of the reasons for their detention, as set out in a detention notice written in English. The text of the notice was read out by a government official with the assistance of interpreters from the relevant language groups.

6.9 The *Ocean Viking* authors were advised that they had not met the security requirements for the granting of a visa to settle in Australia permanently and were therefore required to be detained while resettlement solutions were considered. The other authors were told that they were detained because they were suspected of being unlawful non-citizens. When DIAC received advice from ASIO about the adverse security assessments, the authors were informed accordingly and explained that, as a result, they were not eligible for a permanent visa.

Article 9, paragraph 4

6.10 The authors have access to judicial review of the legality of their detention, and a court may order their release if the detention does not comply with the law. Although section 494AA of the Migration Act bars certain legal proceedings relating to offshore entry persons, the section specifically indicates that the provision does not affect the constitutional jurisdiction of the High Court.

6.11 Judicial review of adverse security assessments provides an important opportunity for courts to consider the release of information by ASIO to affected individuals. A party to the judicial review proceeding may seek access to any information, subject to relevance and to a successful claim for public interest immunity.

Articles 7 and 10 (para. 1)

6.12 The system of immigration detention and the treatment of the authors in detention do not give rise to severe physical or mental suffering of the degree required to constitute treatment contrary to these provisions. Further, the system of mandatory immigration detention of unauthorized arrivals is not arbitrary per se and the individual detention of each author is not arbitrary, as it is reasonable, necessary, proportionate, appropriate and justifiable in all of the circumstances. Protracted detention is not in and of itself sufficient to amount to violation of these articles.

6.13 The State party refutes the allegations that the conditions of detention amount to inhuman or degrading treatment. The authors have been placed in accommodation assessed to be most appropriate to their circumstances. A total of 11 authors are in immigration detention centres, 20 in immigration residential housing and 6 in immigration transit accommodation. These facilities are all operated by Serco, a private contractor that is obliged to ensure that people in detention are treated equitably and fairly, with dignity and respect. The actions and behaviour of Serco staff are underpinned by a code of conduct. Serco also has in place policies and procedures to ensure the well-being of detainees.

6.14 Placement reviews take place regularly and have been conducted in each of the authors' cases. Immigration detention is also subject to regular scrutiny from external and independent agencies, such as the Australian Human Rights Commission, UNHCR and the Minister's Council on Asylum Seekers and Detention.

6.15 Persons in immigration detention, particularly irregular maritime arrivals who have been subjected to torture and trauma or have pre-existing mental health issues, may be vulnerable to mental health deterioration, self-harming behaviour and suicide. Events such as the refusal of a visa application, uncertainty around one's immigration status and time in detention can place additional stress on these persons. For this reason, they have access to health care and mental support services appropriate to their individual circumstances, and qualified health professionals conduct regular health assessments.

6.16 All immigration detention facilities, including those in which the authors reside, have on-site primary health care services of a standard generally comparable to the health care available to the Australian community, and take into account the diverse and potentially complex health-care needs of persons detained in such facilities. When required specialist medical treatment is not available on site, detainees are referred to off-site specialists.

6.17 Contrary to the assertions made by the authors, the physical conditions of detention are adequate and subject to continual improvement, and individuals are given sufficient opportunity to participate in recreational activities. Incidents involving unrest or violence may occur, for which Serco has extensive policies in place. The authors have not indicated any incidents of unrest or violence which they have personally witnessed. Restraints are used by Serco only as a last resort and strict limits apply to the level of force that may be deployed.

6.18 The Committee cannot conclude that the authors have been personally subjected to treatment in breach of articles 7 and 10 (para. 1) in the absence of specific allegations regarding each particular author.

Articles 17 (para. 1), 23 (para. 1) and 24 (para. 1)

6.19 There has been no interference with the R. family, given that the family has not been separated, and article 17 does not extend to interference with "family life". Should the Committee disagree, the State party submits that there has been no interference, as the family has been provided with access to support, facilities and activities sufficient to ensure as minimal a disruption to family life as possible. Since 10 August 2010, the family has been housed in Villawood Immigration Residential Housing, which provides private, family-style accommodation within a community setting. The facility contains four duplex houses, each of which has three bedrooms, two bathrooms, a kitchen, living and dining areas and a garage area. A common area contains grassy space, small garden, children's playground equipment, a basketball half-court and a covered recreation area. When the family arrived there they were subject to certain restrictions, due to the security risks Y.R. and S.R. were assessed as posing. These restrictions were eliminated afterwards and the family is able to freely associate with others residing in the facilities, receive visitors and participate in off-site activities.

6.20 Should the Committee conclude that the detention amounts to interference with the family, the State party submits that the interference is not unlawful or arbitrary. The degree of hardship experienced by the family is outweighed by the need to protect national security interests.

6.21 The State party has not interfered with the family life of S.S. either. His wife and child live close enough to be able to make daily visits to him, and he is able to visit them at their home on four-hour visits every Saturday. Furthermore, the decision to live separately was made by the family itself. Should the Committee find that the separation of the author from his family amounts to interference with the family, the interference is not unlawful or arbitrary, as it is proportionate to the legitimate aim of Australia of protecting its national security interests.

6.22 For the same reasons, the claims under article 23, paragraph 1, are also without merit. The requirement of protection is subject to reasonable measures taken to control immigration, consistent with the State party's right to control the entry, residence and expulsion of aliens, and to protect national security. Programmes and policies to support families in immigration detention are in place, including through qualified family support personnel, medical staff, counsellors and welfare officers.

6.23 Claims under article 24, paragraph 1, are also without merit. The R. family has relatives in Sydney, the city where Villawood is located. The children therefore have the option of residing with relatives, while remaining in proximity to their parents. They remain in detention facilities due to the decision of their parents. By providing the children with the option of residing in the community, the State party has fulfilled its obligations under article 24, paragraph 1.

6.24 Should the Committee not accept the above argument, the State party submits that the circumstances of the R. children's detention does not amount to a violation of article 24, paragraph 1. Their best interests have been taken into account by providing them with adequate protective measures. They are holders of a protection visa, are eligible for access to the same health services as those available to Australian citizens, attend school and are allowed to take part in all school activities.

6.25 As for the S. family, the provision of a number of accommodation options to the family, including options which have enabled the child to maintain a close relationship with his father, live in the community and attend school and other activities, shows that the State party has taken into consideration the best interests of this child.

Remedies

6.26 Given that the authors' rights under the Covenant have not been violated, none of the remedies sought by them should be recommended by the Committee. It would not be appropriate for the Committee to recommend the adult authors' release, given the risk that they are judged to be for national security, and in the light of the recent appointment of an independent reviewer. If the Committee concludes that Australia has breached particular rights, remedies other than release should be recommended.

Allegations of self-harm

6.27 With respect to the allegations of self-harm referred to in para 2.7, on 6 August 2012 the State party informed the Committee that K.N. and S.Y. (authors 11 and 34) had received treatment and support in relation to their physical and mental health issues. The Government of Australia had recently responded to a Commission investigation into the details of the authors. All authors had also undergone mandatory reporting to the Ombudsman regarding their continued immigration detention. The State party endeavours to ensure that all people in immigration detention are provided with an adequate level of support in respect of their mental and physical health needs, accommodated in an environment that helps reduce risks of self-harm, and provided with the support necessary to reduce and manage anxiety resulting from prolonged detention.

Author's comments on the State party's observations on the merits

7.1 On 23 February 2013, the authors provided comments on the State party's observations on merits, reiterating prior arguments and adding the following.

Article 9, paragraph 1

7.2 The detention of the authors is unlawful. Legality under article 9, paragraph 1, must be interpreted not only with respect to domestic law but also with respect to international law, including the Covenant. Detention on security grounds is unlawful under article 9, paragraph 1, because the domestic procedures for review are manifestly inadequate.

7.3 Mandatory detention upon arrival is arbitrary. This is particularly so where the duration of detention between arrival and receipt of the adverse security assessments was so protracted (between 14 months and two years). The State party has not explained the need for this delay.

7.4 The State party makes no attempt to demonstrate that it considered alternatives to detention in each individual case, or explain why particular alternatives are unsuitable. It has provided no evidence regarding its efforts to resettle the authors in a third country.

7.5 Regarding the unavailability or ineffectiveness of the review of detention, the authors argue that the Inspector-General of Intelligence and Security only enjoys a power of recommendation and cannot provide an effective remedy in the form of a legally enforceable right to have an adverse security assessment overturned.

Article 9, paragraph 2

7.6 The detention notice received by the authors upon arrival does not set out why each author is individually considered to be a risk, thus necessitating detention, whether for reasons of identity, security, health or likelihood of absconding. Similarly, the DIAC letters informing authors about the ASIO assessment do not identify the security reasons for their detention. The State party has not provided any evidence that each author in fact received the written detention notice on arrival in Australia, or that every author at Christmas Island was notified in a language he or she could understand.

Article 9, paragraph 4

7.7 If the authors' detention is found by the Committee to be unlawful under article 9, paragraph 1, for not being necessary or proportionate, article 9, paragraph 4, would also be violated, as the Australian courts lack power to review the necessity of detention. As regards High Court review, the Court decides only about 100 cases per year as the highest court of appeal and constitutional review in Australia. It is unrealistic to suggest that judicial review is effectively available to the authors when the case load of the High Court is so small, many thousands of offshore entry persons are detained each year and the jurisdiction of other federal courts is excluded. Furthermore, preparing an application to the High Court requires extensive resources and legal representation which are unavailable to them.

Articles 7 and 10 (para. 1)

7.8 Several Australian independent institutions have criticized the inadequacy of the conditions in all immigration detention centres and the impact they have on mental health. The continuing deterioration of the mental health of detainees is evidence that the health measures taken by Australia are insufficient to ensure the detainees' safety where protracted detention itself is a medically untreatable cause of harm. The following facts affect the determination whether the authors' detention is inhumane or degrading: (a) the authors are refugees entitled to special protection, where detention should be a last resort and for the shortest possible time; (b) most of the authors were traumatized by the experience of fleeing Sri Lanka; (c) some of the authors have been diagnosed with mental illnesses and cannot be effectively treated so long as they remain in detention; (d) some of the authors are children who are especially vulnerable.

7.9 If the Committee is unable to find violations of article 7 because of insufficient evidence, it is still open to the Committee to find a violation of article 10, paragraph 1, because the authors, as a group, have experienced ill-treatment in their circumstances of indefinite detention under adverse physical and health conditions.

Articles 17 (para. 1), 23 (para. 1) and 24 (para. 1)

7.10 The unlawful and/or arbitrary detention of the parents constitutes a failure to pay due regard to the best interest of the children, who are then forced to choose between two alternatives, neither of which is in their best interest: separation from their parents or residing in detention with them.

Issues and proceedings before the Committee

Consideration of admissibility

8.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the case is admissible under the Optional Protocol to the Covenant.

8.2 The Committee has ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

8.3 The Committee notes the State party's challenge to the admissibility of the communication on the ground that domestic remedies have not been exhausted. The State party contends that the five authors belonging to the *Ocean Viking* group, as they are entitled to apply for protection visas, could have sought judicial review before the High Court. However, the Committee considers that the State party has not demonstrated the availability of an effective remedy for the authors' claims regarding their prolonged and potentially indefinite detention, even if they were not subject to the same indefinite detention regime as the other authors. The State party has not shown that its courts have the authority to make individualized rulings on the justification for each author's detention during the lengthy proceedings involved. Moreover, the Committee notes that in the High Court's decision of 5 October 2012 in the *M47* case, the High Court upheld the continuing mandatory detention of an *Ocean Viking* refugee. Accordingly, the Committee concludes that the State party has not demonstrated the existence of effective remedies to be exhausted, and that for these authors the communication is admissible with reference to article 5, paragraph 2 (b), of the Optional Protocol.

8.4 All of the other authors who are offshore entry persons and are barred from making visa applications, except two, did not seek judicial review of the decision regarding their detention and the basis for their security assessment. Of these two, one author made an application to the High Court but later discontinued his case, and the application of the second one is still pending. However, the Committee considers that the State party has not demonstrated the availability of an effective remedy for the authors' claims regarding their detention. The possibility that the State party's highest court may someday overrule its precedent upholding indefinite detention does not suffice to indicate the present availability of an effective remedy. The State party has not shown that its courts have the authority to make individualized rulings on the justification for each author's detention. Moreover, it is also relevant for these authors that the decision of the High Court in the *M47* case upheld the continuing mandatory detention of the refugee, demonstrating that a successful legal challenge need not lead to release from arbitrary detention. Accordingly, the Committee concludes that the State party has not demonstrated the existence of effective remedies to be exhausted, and that for these other authors the communication is admissible with reference to article 5, paragraph 2 (b), of the Optional Protocol.

8.5 The Committee also notes the State party's argument that the authors' claim under article 9, paragraph 2, should be declared inadmissible *ratione materiae* as this provision is limited to the arrest of persons in connection with the commission of criminal offences. However, the Committee considers that the term "arrest" in the context of this provision means the initiation of a deprivation of liberty regardless of whether it occurs in criminal or administrative proceedings and that individuals have a right to notice of reasons for any arrest.[11] Accordingly, the Committee considers that this claim is not inadmissible *ratione materiae* or on other grounds and should be examined on its merits.

8.6 Regarding the claims under articles 7 and/or 10 (para. 1) of the Covenant, the Committee considers that they have been sufficiently substantiated for purposes of admissibility and declares them admissible.

8.7 Concerning the claims of authors belonging to the R. family that their detention constitutes a violation of articles 17 (para. 1) and 23 (para. 1), as well as article 24 (para. 1), with respect to their three children, the Committee notes that the family has been given the possibility to stay together, has been provided with special residential housing and that educational, recreational and other programmes, including outside the facility, are provided, in particular to the children. Notwithstanding the difficulties that living in detention entails, the Committee considers that, in the circumstances, the authors' claims have been insufficiently substantiated and declares them inadmissible under article 2 of the Optional Protocol.[12] As for the claims of S.S. (author 20) under the same articles, given the arrangements made by the State party to facilitate the contacts between S.S. and his wife and child living in the community, the Committee also considers that, in the circumstances, the author's claims have been insufficiently substantiated for purposes of admissibility.

8.8 The Committee accordingly decides that the communication is admissible insofar as it appears to raise issues under articles 7, 9 (paras. 1, 2 and 4) and 10 (para. 1).

Consideration of the merits

9.1 The Human Rights Committee has considered the communication in the light of all the information made available to it by the parties, as provided for under article 5, paragraph 1, of the Optional Protocol.

Claims under article 9, paragraph 1

9.2 The authors claim that their mandatory detention upon arrival and its continuous and indefinite character for security reasons is unlawful and arbitrary, thus constituting a violation of article 9, paragraph 1, of the Covenant. They claim that their detention is disproportionate to the security risk that they are said to pose and that domestic procedures for its review are manifestly inadequate. The State party argues that the adult authors are unlawful non-citizens who are being detained in application of the Migration Act and the Australian Security Intelligence Organisation Act; that their detention is therefore lawful and constitutionally valid, as previously declared by the High Court; and that it is also a proportionate response to the security risk they have been found to pose.

9.3 The Committee recalls that the notion of "arbitrariness" is not to be equated with "against the law", but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability, and due process of law.[13] Detention in the course of proceedings for the control of immigration is not arbitrary per se, but the detention must be justified as reasonable, necessary and proportionate in the light of the circumstances and reassessed as it extends in time. Asylum seekers who unlawfully enter a State party's territory may be detained for a brief initial period in order to document their entry, record their claims and determine their identity if it is in doubt. To detain them further while their claims are being resolved would be arbitrary absent particular reasons specific to the individual, such as an individualized likelihood of absconding, danger of crimes against others, or risk of acts against national security. The decision must consider relevant factors case-by-case, and not be based on a mandatory rule for a broad category; must take into account less invasive means of achieving the same ends, such as reporting obligations, sureties or other conditions to prevent absconding; and must be subject to periodic re-evaluation and judicial review. The decision must also take into account the needs of children and the mental health condition of those detained. Individuals must not be detained indefinitely on immigration control grounds if the State party is unable to carry out their expulsion.

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[11] See general comment No. 8 (1982) on the right to liberty and security of persons (*Official Records of the General Assembly, Thirty-seventh Session, Supplement No. 40* (A/37/40), annex V), paras. 1 and 4; communications No. 1460/2006, *Yklymova v. Turkmenistan*, Views adopted on 20 July 2009, para. 7.2; and No. 414/1990, *Mika Miha v. Equatorial Guinea*, Views adopted on 8 July 1994, para. 6.5.

[12] Communication No. 1050/2002, *D. and E. v. Australia*, Views adopted on 11 July 2006, para. 6.4.

[13] See communications No. 1134/2002, *Gorji-Dinka v. Cameroon*, Views adopted on 17 March 2005, para. 5.1; and No. 305/1988, *van Alphen v. Netherlands*, Views adopted on 23 July 1990, para. 5.8.

9.4 The Committee observes that the authors have been kept in immigration detention since 2009 or 2010, first under mandatory detention upon arrival and then as a result of adverse security assessments. The basis of detention of the *Ocean Viking* authors may have changed after the October 2012 decision of the High Court ruled that the ASIO regime was inapplicable, but the other authors remain in indefinite detention on security grounds. Whatever justification there may have been for an initial detention, for instance for purposes of ascertaining identity and other issues, the State party has not, in the Committee's opinion, demonstrated on an individual basis that their continuous indefinite detention is justified. The State party has not demonstrated that other, less intrusive, measures could not have achieved the same end of compliance with the State party's need to respond to the security risk that the adult authors are said to represent. Furthermore, the authors have been kept in detention in circumstances where they are not informed of the specific risk attributed to each of them and of the efforts undertaken by the Australian authorities to find solutions which would allow them to obtain their liberty. They are also deprived of legal safeguards allowing them to challenge their indefinite detention. For all these reasons, the Committee concludes that the detention of both groups of authors is arbitrary and contrary to article 9, paragraph 1, of the Covenant. This conclusion extends to the three minor children, as their situation, irrespective of their legal status as lawful non-citizens, cannot be disassociated from that of their parents.

Claims under article 9, paragraph 2

9.5 The authors claim that, individually considered, they were not informed by the authorities of the substantive reasons for their detention, neither upon arrival nor after the assessment made by ASIO. The State party argues that, upon arrival, most of the authors were provided with a detention notice explaining that they were suspected of being unlawful non-citizens and that later on each of them were informed of the ASIO security assessment by letter. The Committee first observes that article 9, paragraph 2, requires that anyone who is arrested be informed, at the time of arrest, of the reasons for the arrest, and that this requirement is not limited to arrest in connection with criminal charges.[14] The Committee considers that, as far as their initial detention is concerned, the information provided to the authors is sufficient to meet the requirements of article 9, paragraph 2. For those authors who later received an adverse security assessment, this assessment represented a subsequent phase in their migration processing, and did not amount to a new arrest implicating article 9, paragraph 2, but rather must be considered in relation to article 9, paragraph 1. However, for the five authors in the *Ocean Viking* group, a prior security assessment provided the basis for their initial detention. In this regard the Committee considers that one major purpose of requiring that all arrested persons be informed of the reasons for the arrest is to enable them to seek release if they believe that the reasons given are invalid or unfounded; and that the reasons must include not only the general basis of the arrest, but enough factual specifics to indicate the substance of the complaint. Given the vague and too general justification provided by the State party as to the reasons for not providing the authors with specific information about the basis for the negative security assessments, the Committee concludes that, for these five authors, there has been a violation of article 9, paragraph 2, of the Covenant.

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[14] See note 11 above.

Claims under article 9, paragraph 4

9.6 Regarding the offshore entry authors' claim that their detention cannot be challenged under Australian law and that no court has jurisdiction to assess the substantive necessity of their detention, the Committee notes the State party's argument that the authors can seek judicial review before the High Court of the legality of their detention and the adverse security assessment. In view of the High Court's 2004 precedent in *Al-Kateb v. Godwin* declaring the lawfulness of indefinite immigration detention, and the absence of relevant precedents in the State party's response showing the effectiveness of an application before the High Court in similar situations, the Committee is not convinced that it is open to the High Court to review the justification of the authors' detention in substantive terms. Furthermore, the Committee notes that in the High Court's decision in the *M47* case, the Court upheld the continuing mandatory detention of the refugee, demonstrating that a successful legal challenge need not lead to release from arbitrary detention. The Committee recalls its jurisprudence that judicial review of the lawfulness of detention under article 9, paragraph 4, is not limited to mere compliance of the detention with domestic law but must include the possibility to order release if the detention is incompatible with the requirements of the Covenant, in particular those of article 9, paragraph 1.[15] Accordingly, the Committee considers that the facts in the present case involve a violation of article 9, paragraph 4.

9.7 Regarding the *Ocean Viking* authors, the High Court's decision of 5 October 2012 in the *M47* case made it clear that judicial review before the High Court did provide a means for challenging the legality of detention on the basis of ASIO security assessments regardless of the individual facts. Nonetheless, the High Court's decision demonstrates that successful claimants would be remitted to the mandatory detention regime pending the resolution of their applications for a protection visa. The Committee therefore concludes that, during the relevant period, the *Ocean Viking* authors have also been subject to violations of article 9, paragraph 4.

Claims under articles 7 and 10 (para. 1)

9.8 The Committee takes note of the authors' claims under articles 7 and 10 (para. 1) and the information submitted by the State party in this regard, including on the health-care and mental support services provided to persons in immigration detention. The Committee considers, however, that these services do not take away the force of the uncontested allegations regarding the negative impact that prolonged indefinite detention on grounds that the person cannot even be apprised of can have on the mental health of detainees. These allegations are confirmed by medical reports concerning some of the authors. The Committee considers that the combination of the arbitrary character of the authors' detention, its protracted and/or indefinite duration, the refusal to provide information and procedural rights to the authors and the difficult conditions of detention are cumulatively inflicting serious psychological harm upon them, and constitute treatment contrary to article 7 of the Covenant. In the light of this finding, the Committee will not examine the same claims under article 10, paragraph 1, of the Covenant.

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[15] Communications No. 1014/2001, *Baban v. Australia*, Views adopted on 6 August 2003, para. 7.2; No. 1069/2002, *Bakhtiyari v. Australia*, Views adopted on 29 October 2003, para. 9.4; Nos. 1255, 1256, 1259, 1260, 1266, 1268, 1270, 1288/2004, *Shams et al. v. Australia*, Views adopted on 20 July 2007, para. 7.3.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the State party has violated the authors' rights under articles 7 and 9 (paras. 1 and 4) of the Covenant. The State party has also violated article 9, paragraph 2, with respect to five authors.

11. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the authors with an effective remedy, including release under individually appropriate conditions, rehabilitation and appropriate compensation. The State party is also under an obligation to take steps to prevent similar violations in the future. In this connection, the State party should review its migration legislation to ensure its conformity with the requirements of articles 7 and 9 (paras. 1, 2 and 4) of the Covenant.

12. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when it has been determined that a violation has occurred, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views, and to have them widely disseminated in the State party.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Appendices

Appendix I

Names of authors and places of detention[a]

1. Mr. F.K.A.G. (Scherger IDC)
2. Mr. T.A. (Scherger IDC)
3. Mr. S.B. (Villawood IDC)
4. Mr. V.E. (Christmas Island IDC)
5. Mr. S.G. (Scherger IDC)
6. Mr. S.G. (Northern IDC at Darwin)
7. Mr. T.K. (Christmas Island IDC)
8. Mr. S.K. (Villawood IDC, Blaxland)
9. Mr. S.M. (Villawood IDC)
10. Mr. N.M. (Northern IDC at Darwin)
11. Mr. K.N. (Maribyrnong IDC)
12. Mr. J.P. (Curtin IDC)
13. Ms. S.R. (Villawood IDC)
14. Master A.R. (Villawood IDC)
15. Miss A.R. (Villawood IDC)
16. Master V.R. (Villawood IDC)
17. Mr. Y.R. (Villawood IDC)
18. Mr. R.R. (Scherger IDC)
19. Mr. K.S. (Curtin IDC)
20. Mr. S.S. (Villawood IDC, Fowler)
21. Mr. D.S. (Maribyrnong IDC)
22. Mr. S.S. (Maribyrnong IDC)
23. Mr. N.S. (Villawood IDC, Fowler)
24. Mr. M.S. (Villawood IDC, Fowler)
25. Mr. N.S. (Villawood IDC)
26. Mr. N.S. (Villawood IDC, Fowler)
27. Mr. K.S. (Villawood IDC, Blaxland)
28. Mr. T.S. (Villawood IDC, Fowler)

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[a] IDC: Immigration Detention Centre.

29. Mr. P.S. (Villawood IDC, Fowler)
30. Mr. K.T. (Maribyrnong IDC)
31. Mr. S.T. (Villawood IDC, Blaxland)
32. Mr. M.T. (Scherger IDC)
33. Mr. V.V. (Scherger IDC)
34. Mr. S.Y. (Maribyrnong IDC)
35. Mr. S.S. (Curtin IDC)
36. Mr. S.B. (Scherger IDC)
37. Mr. S.S. (Northern IDC at Darwin)

Appendix II

Individual opinion by Committee member, Sir Nigel Rodley

I refer to my separate opinion in *C. v. Australia*.[a] I consider the finding of a violation of article 9, paragraph 4, circular and superfluous, since the lack of legal safeguards to challenge the detention is part of and arguably central to the above finding of a violation of article 9, paragraph 1. I also remain unconvinced that the protection of article 9, paragraph 4, requiring the ability to challenge the lawfulness of a detention extends far beyond, if at all, a challenge to lawfulness under national law. Unlawfulness under international law is precisely the province of article 9, paragraph 1.

[Done in English. Subsequently to be issued also in Arabic, Chinese, French, Russian and Spanish, as part of the present report.]

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[a] See communication No. 900/1999, *C. v. Australia*, Views adopted on 28 October 2002, individual opinion of Committee member Sir Nigel Rodley.

KK. Communication No. 2102/2011, *Paadar et al. v. Finland* (Views adopted on 26 March 2014, 110th session)*

Submitted by:	Kalevi Paadar, Eero Paadar and his family, Veijo Paadar, and Kari Alatorvinen and his family (represented by counsel Johanna Ojala)
Alleged victims:	The authors
State party:	Finland
Date of communication:	22 September 2011 (initial submission)
Subject matter:	Forced slaughter of the authors' reindeer
Procedural issue:	None
Substantive issues:	Unfair trial, right to equality and non-discrimination, right of indigenous peoples to enjoy their own culture
Articles of the Covenant:	14 (1); 26; 27
Article of the Optional Protocol:	None

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 26 March 2014,

Having concluded its consideration of communication No. 2102/2011, submitted to the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the authors of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The authors of the communication are Kalevi Paadar, Eero Paadar and his family (his wife Taimi Jetremoff and his three minor children Hannu, Marko and Petri Paadar), Veijo Paadar, and Kari Alatorvinen and his family (his wife Paula Alatorvinen, and his four children, Johanna, born on 13 December 1986; Jennika, born on 22 June 1988; Joonas, born on 21 March 1991; and Juuli Alatorvinen, born on 13 March 2001). All of them except Kari Alatorvinen are indigenous Sami. Mr. Alatorvinen's wife and children are also Sami. The authors allege a violation by Finland of article 14, paragraph 1; article 26; and article 27 read alone and in conjunction with article 1, of the Covenant. The authors are represented. The Optional Protocol entered into force for the State party on 23 March 1976.

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* The following members of the Committee participated in the examination of the present communication: Mr. Yadh Ben Achour, Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Walter Kälin, Ms. Zonke Zanele Majodina, Mr. Gerald L. Neuman, Sir Nigel Rodley, Mr. Victor Manuel Rodríguez-Rescia, Mr. Fabián Omar Salvioli, Ms. Anja Seibert-Fohr, Mr. Yuval Shany, Ms. Margo Waterval and Mr. Andrei Paul Zlătescu.

The text of an individual opinion by Committee members Mr. Kälin, Mr. Rodríguez-Rescia, Ms. Seibert-Fohr and Mr. Shany is appended to the present Views.

1.2 On 23 September 2011, the Committee, acting through its Special Rapporteur on new communications and interim measures, requested the State party to refrain from any further forced slaughtering of the authors' reindeer while their case was under consideration by the Committee. On 23 March 2012, the State party indicated that it had complied with that request.

The facts as submitted by the authors

2.1 The authors are full-time reindeer herders. They live in the village of Nellim and belong to the Ivalo Reindeer Herding Cooperative ("the Cooperative"), which is divided into two herding groups, one in the north around the village of Nellim and one in the south around the village of Ivalo. The Nellim herding group and Nellim village form a distinct Sami community within the broader area of the Cooperative. The Nellim herding group is made up almost exclusively of Sami and retains traditional methods of herding that are constitutive of the Sami culture. The four authors and their families are the only remaining families whose income is based primarily on reindeer herding. The remaining herders in the Nellim group own smaller numbers of reindeer and do not earn their primary income from herding.

2.2 Reindeer herding is made difficult in the Nellim area by the winter conditions and different pastures, as compared to those of the Ivalo group. In addition to dissimilarities with regard to pastures, predators and snow conditions, the reindeer husbandry of the two groups differs in that the authors' reindeer herding is based solely on the utilization of natural pastures. Whereas the Ivalo group provides its reindeer with significant amounts of feed, the authors give hay to their reindeer in winter only to guide them, and to make them move to pastures of lichen and stay there. Reindeer feeding is not a part of Sami herding, which is based on free pasturage.

2.3 The Cooperative is a public law entity. It is not a private association established freely by its members; nor is it a traditional and voluntary reindeer herding unit established by the indigenous Sami people who used to herd reindeer in natural communities, such as a family or a village. The cooperative system was imposed through legislation in the 1930s and is currently regulated by the Reindeer Husbandry Act ("the Act"), which came into force in 1990.

2.4 The majority of the Cooperative's herders belong to the Ivalo group. The Nellim group has fewer reindeer and is in the minority as far as decision-making is concerned. The Nellim group has unsuccessfully tried to separate itself from the Cooperative to form its own. According to the authors, disagreements within the Cooperative are the result of State interference in Sami reindeer herding via the creation of artificially large units to administer reindeer herding, instead of leaving it to the Sami themselves to determine the kind of natural communities that are the most suitable for their herding. Traditional Sami reindeer husbandry is based on small herding groups comprised of natural communities that have their own traditional pastures.

2.5 Under section 21 of the Act, the Ministry of Agriculture and Forestry determines, for periods of 10 years at a time, the maximum number of live reindeer that a cooperative may keep on its territory and the maximum number of such reindeer that a shareholder of a cooperative may own. When determining the maximum number of live reindeer that a cooperative may keep, the Ministry must ensure that the number of reindeer grazing on the cooperative's territory during the winter season does not exceed the sustainable production capacity of the cooperative's winter pasture.

2.6 Under section 22 (1) of the Act, if the number of live reindeer of a cooperative or a reindeer owner exceeds the maximum number referred to in section 21, the cooperative must, in the course of the following herding year, decide on reducing the number of reindeer to the maximum allowable number. Under section 22 (2), on special grounds, a cooperative may decide that the number of reindeer belonging to a shareholder will not be reduced, in which case equivalent reductions will be carried out among the other owners in proportion to their number of reindeer. According to section 22 (3), if it becomes clear that reindeer numbers in the following herding year would exceed the maximum allowable number, the cooperative may decide that the number of reindeer must be reduced during the current herding year. The cooperative's decision can be enforced immediately, unless the Administrative Court decides otherwise as a result of a claim. According to section 22 (4), if the owner does not reduce the number of his or her reindeer in accordance with the decision of the cooperative, the chair of the cooperative may decide that the cooperative will carry out the reduction on behalf of the owner.

2.7 At the time of the facts, the highest allowable number of reindeer for the Ivalo cooperative was 6,000. The authors contend that this number had not been exceeded during the four years before 2011. In fact, the number had only been exceeded once during the past decade (in 2004/05).

2.8 According to the authors, for several years the Cooperative's slaughtering plans have been formulated in a way that, in practice, has led to the number of the authors' reindeer decreasing dramatically, much more so than for the Ivalo group. The reason for this is the model used by the Cooperative for reducing reindeer numbers. The model fails to take into account the fact that — in contrast with the practices of the Ivalo herding group — the nature-based herding methods of the Nellim group, which rely on free grazing in natural pastures, amount to an inbuilt control mechanism for the size of the herd. Calf losses are an integral part of traditional Sami herding methods.

2.9 Every year, a large proportion of the newborn calves belonging to the Nellim group disappear in the forest, owing to a range of different natural conditions and, in particular, their exposure to predators. At the time of the round-ups, which take place from October to January, between 30 and 50 per cent of the calves that have been born in spring go missing. In comparison, the calf losses of the Ivalo group are much smaller, because their reindeer are kept closer to human settlements, which reduces their exposure to predators. Furthermore, the herding area of the Nellim group is located in a wide and remote border area on Finnish, Norwegian and Russian territory. According to recent scientific studies, there is a dense population of bears in this area, which is the main reason for the heavy annual calf losses. Current legislation[1] forbids the killing or disturbing of bears and eagles, either entirely, or during the spring and summer, which is when most of the calf losses occur. The only lawful means of combating heavy calf losses would be to stop traditional free grazing on natural pastures and to introduce artificial extra feeding, which would not be economically feasible in Nellim and would amount to a forced change to traditional herding practices.

2.10 The imbalance in predation pressure is not taken into account when the slaughtering plan is decided upon by a majority in the Cooperative. The plan lays down a slaughtering percentage (usually 70 per cent or more), which is based on the number of adult reindeer that the owners had at the end of the previous herding year in May. As a result, the number of animals to be slaughtered is determined without taking into account the losses that have occurred in the intervening months. Even if around 90 per cent of the female adult reindeer have given birth to a calf, up to 50 per cent of the calves are no longer alive at the time of the round-up. In calculating the number of reindeer to be slaughtered, the newborn calves are not taken into account, but they can nevertheless be used to fulfil the slaughter obligation. The Nellim herders, unlike the Ivalo group in the Cooperative, do not have enough calves to fulfil their slaughter quota. As a result, they are forced to kill their adult female reindeer, which they need as a productive base for their herding economy.[2]

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[1] The authors refer to the Nature Conservation Act and the Game Husbandry Act, which hinder control of the numbers of predators that prey on reindeer.

2.11 In 2005, one of the authors, Kalevi Paadar, complained to Rovaniemi Administrative Court about the Cooperative's decision to decrease the number of reindeer in a way that would threaten his occupation and lifestyle as a Sami reindeer herder. His complaint was dismissed on 13 December 2005, as the Court considered the Cooperative's decision to be legally valid. Kalevi Paadar appealed the dismissal to the Supreme Administrative Court, which, on 10 April 2007, upheld the judgement of the Rovaniemi court.

2.12 In its spring meeting on 31 May 2007, the Cooperative approved the slaughter plan for the 2007/08 herding year. The plan imposed slaughter obligations on all shareholders in the same percentage, on the basis of the number of live reindeer held in the previous herding year. The reindeer not slaughtered in the 2006/07 herding year (the so-called backlog reindeer) were to be slaughtered first.

2.13 At its autumn meeting on 7 October 2007, the Cooperative decided, with regard to the backlog reindeer, that it would carry out the reductions on behalf of the owners. For the authors, this meant that all of their animals taken to the round-up would be slaughtered until the Cooperative's decisions on reducing reindeer numbers that had been taken in the previous years had been implemented. In addition, the authors were requested to slaughter a share corresponding to the current year's slaughter percentage. According to the authors, the total slaughter numbers demanded by the Cooperative exceeded the number of adult reindeer that they had at the end of the previous herding year. Even counting the likely number of calves (equivalent to 50 or 60 per cent of the number of adult female reindeer), the slaughter demands exceeded the total number of reindeer that the authors estimated they would have at the time of the round-ups.[3] Almost no animals would be left, and the authors would no longer be able to pursue reindeer husbandry since, according to the law, herders cannot buy new reindeer and continue herding once they have lost all their reindeer.

2.14 The Nellim case is not unique in the Sami areas of Lapland. There are other similar disputes between cooperatives and Sami groups belonging to them with regard to numbers of reindeer to be slaughtered. However, most of the Sami cooperatives in the State party apply slaughter systems that differ from the one used in Ivalo by the way in which they take calf loss into consideration. In those systems, different slaughter percentages apply to adult reindeer and to calves, and heavy calf loss is not punished by the additional killing of adult reindeer as it is under the Ivalo model. The fundamental problem with the Ivalo model is that the reindeer reduction is not carried out in proportion to the actual number of live reindeer found in the round-ups, but in proportion to a number which is severely distorted at the time of slaughter. The other models enable the owner to retain his or her proportionate share of the cooperative's total number of reindeer, regardless of the high number of missing calves.

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[2] Reindeer herding in Finland is based mainly on calf slaughter, where only some of the young animals are left alive to compensate for the annual loss of adults.

[3] According to the figures provided by the authors, the total number of adult reindeer owned by the four families was 418 for the 2011/12 herding year; the predicted slaughter request for the 2011/12 herding year was estimated at 932. This is despite the fact that the authors' adult reindeer numbers had already decreased between 2003 and 2010.

2.15 The authors filed a complaint against the Cooperative's decision of 7 October 2007, with Rovaniemi Administrative Court, and requested interim protection measures. They claimed that setting the slaughter plan in the same way for all of the Cooperative's shareholders prevented the Sami from practising their livelihood and their culture and was therefore discriminatory against them. On 11 October 2007, the Court ordered the slaughter to be halted. By then, the Cooperative had already slaughtered part of the authors' herd. On 19 October 2007, the Administrative Court dismissed the case without examining the merits. The judgement made no reference to the authors' Sami origin or to the Covenant. On the same date, the authors filed an urgent request for interim measures with the Supreme Administrative Court, mentioning in their application that the slaughtering would continue the next day, which was a Saturday. As there was nobody who could look at the appeal during the weekend, the slaughter continued on 20 October 2007. However, on 23 October 2007, the Supreme Administrative Court ordered it to stop.

2.16 On 4 April 2008, the Supreme Administrative Court reversed the judgement of Rovaniemi Administrative Court and returned the case to it for retrial. In its judgement of 15 August 2008, Rovaniemi Administrative Court rejected the authors' claims. It considered that the shareholders were to be treated equally regardless of their ethnic background. Therefore, the Cooperative's decision of 7 October 2007 could not be considered discriminatory against the Sami people in the light of the Constitution and the international treaties binding upon the State party.

2.17 In September 2008, the authors appealed to the Supreme Administrative Court, arguing that implementation of the Cooperative's decision of 7 October 2007 would mean the end of their reindeer husbandry, as the forced slaughter would include their so-called capital reindeer, that is to say, the female reindeer. It would also mean the disappearance of the Nellim herd as an independent unit, as there would not be a sufficient number of herders or of reindeer left. The livelihood of the Sami in Nellim would therefore come to an end. These claims, uncontested by the Cooperative, were made with reference to, inter alia, article 27 of the Covenant.

2.18 The Court requested a statement from the Government concerning the implementation of section 22 of the Act and matters related to the position of the Sami as indigenous people. Statements were received from the Ministry of Agriculture and Forestry, the Ministry for Foreign Affairs, the Ministry of Justice, the Finnish Game and Fisheries Research Institute and the Reindeer Herders' Association.

2.19 On 2 February 2011, the Supreme Administrative Court upheld the judgement of Rovaniemi Administrative Court. The Court found that the effects of the Cooperative's decision "on the manner of implementation of reindeer slaughter for specific years are not such that they would constitute an infringement of operational conditions for livelihood and culture, even if the potential differences in the approaches to reindeer herding are taken into account. Further, in the matter, on the one hand general equality needs to be considered, i.e. equality among all reindeer owners, and on the other hand, the realization of equality among the Sami reindeer owners, in particular taking into account the premises for reindeer herding carried out in the traditional manner. In this respect, it has not been shown, taking into account the perspectives presented by both sides, that the reindeer herding cooperative would have superseded requirements concerning equality in deciding, inter alia, on the method of slaughter of the appellants' so-called backlog reindeer. On the above-mentioned grounds, the decision of the Ivalo Reindeer Herding Cooperative dated 7 October 2007 on the method of implementation for reduction of the number of reindeer is not contrary to … the Constitution of Finland or basic rights and liberties and human rights".

2.20 The Court's judgement is final and cannot be appealed against. Domestic remedies have therefore been exhausted. On 18 September 2011, the board of the Cooperative decided that the authors must slaughter all of their reindeer starting on 26 September 2011.

2.21 The authors add that, in recent years, two issues have caused tension between them and the other members of the Cooperative. One concerns the way that pastures have been divided between the two herding groups by a fence, leading to difficulties for the Nellim group in carrying out traditional Sami reindeer herding and arguably being one reason for the group's higher calf losses. The fence makes it impossible for the Nellim herd to move along their natural migration routes and return to their winter grazing grounds once summer is over. The fact that the Ivalo herding group has a majority vote in the Cooperative keeps the fence closed at that time of the year. The other issue concerns the forestry operations of the Finnish Forest Service. Traditional Sami reindeer herding depends on the natural forest and is adversely affected by forestry, which is why the Nellim group is opposed to logging and other forestry measures in its area. The Ivalo group is the only herding group within the Sami Homeland in Finland that practises extensive reindeer feeding and herds reindeer using non-Sami methods. As a result, this herding group is less vulnerable to forestry activities. The Ivalo group and, hence, the Ivalo cooperative, has been actively against actions by the Nellim group and other Sami herding cooperatives aimed at bringing about a reduction in forestry operations by the Forest Service.

2.22 In 2010, a lawsuit initiated by the Paadars against the Forest Service resulted in a settlement between the two parties whereby most of the remaining forests around Nellim were saved for the purpose of reindeer herding. However, if the Paadars lose their reindeer, the agreement will become void, since, under the terms of the agreement, the forests are exempt from forestry operations only so long as the Paadars or their relatives are reindeer herders.

The complaint

3.1 The authors allege that the State party violated article 14, paragraph 1, of the Covenant when the Supreme Administrative Court rejected the appeal without weighing the legal claims, arguments and facts of the case. Furthermore, by requesting a statement from the Government, the Court subordinated itself to the Executive, thus violating the authors' right to a fair trial.

3.2 The forced slaughtering of their reindeer entails violations of the authors' rights under article 27 of the Covenant to enjoy their own indigenous culture in community with other Sami. The authors and their families cannot continue their way of life after the slaughtering, because the families will no longer have any reindeer left. This will mean the end of the authors' and their families' Sami livelihood. When taking decisions, the Cooperative is obliged to take into consideration the preservation of the Sami culture, in accordance with section 17, subsection 3, of the Finnish Constitution, and article 27 of the Covenant.

3.3 The decision of the Ivalo Reindeer Herding Cooperative, a public law entity, to slaughter the authors' reindeer is discriminatory both in its purpose and its effects, in violation of article 26 of the Covenant. The authors have been targeted for disproportionate slaughtering of their reindeer because of their Sami way of herding, their Sami ethnicity and their fight against further logging by the Forestry Service on their traditional lands. Even if the discriminatory intent cannot be demonstrated through evidence admissible in court, the effect of the slaughtering would be discriminatory as it affects exclusively those members of the Cooperative who belong to the Sami indigenous people and use the traditional and culturally constitutive Sami herding methods.

3.4 The threat faced by the authors of having their reindeer slaughtered on account of a Reindeer Husbandry Act that does not recognize traditional Sami reindeer herding is the result of a lack of recognition of Sami land rights by the State party. In this respect, the authors recall the concluding observations on the fifth periodic report of Finland, in which the Committee indicated that "the State party should, in conjunction with the Sami people, swiftly take decisive action to arrive at an appropriate solution to the land dispute with due regard for the need to preserve the Sami identity in accordance with article 27 of the Covenant" (CCPR/CO/82/FIN, para. 17). The authors also refer to the report of the Special Rapporteur on the rights of indigenous peoples, in which it is indicated that "Finland should step up its effort to clarify and legally protect Sami rights to land and resources. In particular, Finland should ensure special protections for Sami reindeer husbandry, given the centrality of this means of livelihood to the culture and heritage of the Sami people" (A/HRC/18/35/Add.2, para. 84).

3.5 The authors add that the Anar Sami language is under acute threat, as there are only 300 people who speak it. The survival of the language depends on communities in which the language is used in collective practices. Nellim is one of the most important villages for the language, and the reindeer husbandry of the Nellim herding group is an essential collective practice for Anar Sami language speakers. If the planned slaughters are carried out, the Nellim herding group and reindeer herding as a traditional Sami livelihood in Nellim village will cease to exist, as the village depends on reindeer husbandry and small-scale tourism for its survival. Accordingly, the future of the group and of the village as a whole — and therefore of the Anar Sami language — is under threat.

The State party's observations on admissibility and the merits

4.1 In its note verbale of 22 November 2011, the State party indicated that it had no objections concerning the admissibility of the present communication. On 23 March 2012, the State party submitted observations on the merits.

4.2 The State party refers to sections 21 and 22 of the Reindeer Husbandry Act. It also refers to the Government Bill for the Reindeer Husbandry Act (HE 244/1989), according to which circumstances and practices regarding reindeer herding differ from area to area. In mountain areas they are part of the Sami culture and have special local features. The Bill also indicates that reindeer herding as a whole involves so many features in common that it would not be appropriate to include different provisions for different areas in the Act, but rather only provisions that are applicable to all reindeer herding.

4.3 Under section 14 of the Game Animal Damages Act (105/2009), a new compensation system has been established whereby compensation should be paid for losses of reindeer calves, even if the remains are not found. The compensation is payable for the period between the calving and the last day of the next November. It is calculated for each cooperative on the basis of the producer price of reindeer meat, the estimated calving percentage in the herding area, the number of female reindeer in the territory of the cooperative and the estimated percentage of calf mortality caused by big wild animals in that territory. The compensation for other reindeer found killed is multiplied by 1.5. If the cooperative has suffered exceptionally severe losses, the amount of compensation is multiplied by 3.

4.4 Regarding the national proceedings in the present case, the Supreme Administrative Court, in its judgement of 11 February 2011, stated that the decision of the Cooperative to reduce the number of reindeer should be assessed from the standpoint of equality, among all reindeer owners on the one hand and among Sami owners on the other hand. Failure to respect the requirements of equality had not been substantiated. In the long term, compliance with section 21 of the Act should contribute to maintaining the opportunities for reindeer herding, which is part of Sami culture. Thus, the decision on forced slaughter taken by the Cooperative could not be considered to violate the Constitution or the Covenant.

4.5 Since the year 2000, the maximum permitted number of reindeer for the Ivalo cooperative has been 6,000 and the maximum permitted number for an individual owner has been 500. According to the State party, these numbers are sufficient for carrying on traditional Sami reindeer herding.

4.6 In the 2004/05 herding year, the Cooperative had a total of 6,080 live reindeer. As a result, on 30 July 2005, it decided to adopt a slaughter plan for the 2005/06 herding year. Through the appeals filed by Kalevi Paadar, the conformity of the slaughter plan for the 2005/06 herding year with the requirements of the Act was confirmed by the judgement of the Supreme Administrative Court. On 31 May 2006, the Cooperative adopted a new slaughter plan. On 31 May 2007, the Cooperative issued a slaughter list that indicated each shareholder's so-called arrears (i.e. the reindeer not slaughtered earlier, as well as the so-called extras – the reindeer slaughtered earlier in excess of the slaughtering obligation). No complaints were made against these decisions.

4.7 On 7 October 2007, the Cooperative decided to enforce the decisions. The authors complained to Rovaniemi Administrative Court in regard to this latest decision. On 12 October 2007, the Court stayed the enforcement. However on 19 October 2007, the Court dismissed the case because the authors had not filed a complaint against the slaughter plan which was at the origin of the decision on forced slaughter and which had been approved in a meeting of the Cooperative.

4.8 It appears from both parties' pleadings to the Supreme Administrative Court that most herders in the Cooperative are Sami. Furthermore, according to the judgement of Rovaniemi Administrative Court, the Cooperative has calculated that at its meetings, native Sami people usually hold between 58 and 60 per cent of all voting rights, on average.

4.9 Following the authors' appeal, the Supreme Administrative Court issued, on 23 October 2007, an interim measure prohibiting the slaughtering. On 2 April 2008, it quashed the Rovaniemi court's judgement and referred the matter back to the Rovaniemi court for reconsideration. The Supreme Administrative Court held that the decision of 7 October 2007 could be complained against because it was the first decision on reindeer slaughter taken under section 22, subsection 4, of the Act.

4.10 Rovaniemi Administrative Court reconsidered the complaint but rejected it on 15 August 2008. It nevertheless upheld the prohibition on enforcement of the Cooperative's decision until a final decision was adopted on the case. The authors appealed this judgement to the Supreme Administrative Court, which rejected the appeal on 11 February 2011.

4.11 Reindeer herding cooperatives have been introduced as administrative units because they are needed for organizing the herding for different purposes, for example for agricultural aid and compensation for damage caused by big wild animals. The units are large because they are set up according to local reindeer herding needs. Most cooperatives have both Sami and non-Sami owners as shareholders. Due to the fact that under Finnish law it is prohibited to register ethnicity, it is not possible to provide official statistics on the number of Sami and non-Sami shareholders in different cooperatives.

4.12 The authors indicate that the Nellim herding group has aspired to separate from the Ivalo cooperative and set up its own. However, the State party indicates that the group has not managed to do so because no agreement has been reached within the Ivalo cooperative on how to delimit the territory of the Nellim group.

4.13 Essentially, the authors base their communication on the practice of traditional Sami reindeer herding. However, they do not indicate what they mean by this practice. It is not stated whether they are referring to a nomadic way of life, with herders moving from one place to another with the herd. Normally, the herders move in motorized vehicles and live in stationary buildings constructed for herding purposes.

4.14 Despite the various possible methods of reindeer herding — traditional, developing, mixed and modern — all reindeer herders share the same responsibility of keeping the number of their live reindeer within the prescribed maximum in order to ensure the sustainable production capacity of the cooperative's winter pasture. The reindeer population in Finland is dominated by female animals, in order to maximize the production of calves and the income of the herders. The high proportion of calves has made it possible to increase the number of reindeer. As a rule, the calves are slaughtered before the reindeer move on to winter pastures, which helps to avoid excessive consumption of these pastures. The purpose of these practices has been to improve the profitability of reindeer herding and thus to safeguard the livelihood of herders in the future.

4.15 According to the judgement of 11 February 2011, the Cooperative has Sami members who have fulfilled their slaughtering obligation. It thus appears that the present case does not concern unequal treatment between Sami and non-Sami herders but rather differences between members of the Cooperative. The judgement shows that there are very different opinions concerning reindeer herding methods.

4.16 The Ministry of Agriculture and Forestry has investigated the damage caused to reindeer by wild animals in the territory of the Ivalo cooperative and has found that in essence it does not differ from the damage elsewhere in the herding area or in the Sami Homeland. An incident took place in 2004 when a bear caused exceptionally severe damage during the calving period. However, this incident did not occur in the territory of Nellim but in the southern part of the Cooperative's territory. Under section 41 of the Hunting Act, it is possible to apply for an exceptional licence to kill a big wild animal that causes damage. The authors have not applied for an exceptional licence. In autumn, they have the opportunity to hunt bears in the reindeer herding territory within an established quota. During the period covered by the communication, the quota was not filled so quickly that the authors could not benefit from it. The competent authorities are not aware of any applications for licences to kill wild animals causing damage to reindeer in the territory of Nellim specifically.

4.17 The authors indicate that they carry out reindeer herding by the traditional method. According to the State party, this method should enable the herders to monitor the extent of the damage caused to reindeer by big wild animals much more efficiently than by the method of completely free pasturing. The Regional Council of Lapland has specifically proposed shepherding as one means of reducing damage caused to reindeer by wild animals.

4.18 With respect to the authors' claims under article 14, paragraph 1, of the Covenant, the State party indicates that the national courts, including the Supreme Administrative Court, thoroughly assessed the authors' complaint — also from the standpoint of the special rights of the Sami — taking into account international human rights obligations, especially those deriving from the Covenant. They reasoned their judgements appropriately and extensively. A fair trial, as set out in article 14, is guaranteed when the court in question, such as the Supreme Administrative Court in the present case, obtains all the necessary information for a thorough examination of the case. Fair trial guarantees ensure that all parties to legal proceedings have had the right to be heard.

4.19 The State party concludes that the facts of this case do not reveal any breach of articles 14 and 26; nor of article 27 read alone and in the light of article 1.

Author's comments on the State party's observations

5.1 On 18 June 2012, the authors submitted comments on the State party's observations. They reiterate that the judgement of the Supreme Administrative Court means the end of reindeer herding for the Nellim herding group, a fact that the State party does not dispute.

The complete loss of a whole reindeer herding group has a substantial impact and, accordingly, amounts to a denial of the right to enjoy the Sami culture. The pastures and the circumstances of the Nellim herding group and the Ivalo herding group are different – a fact that should be taken into consideration in decisions concerning, for instance, forced slaughtering. The law and its application lead to different and unequal treatment of these two groups.

5.2 In its observations, the State party does not consider the role of predators in the issue at hand. The authors disagree with the State party's assessment that the compensation provided to cover losses is sufficient and constitutes an effective manner of tackling the problems caused by exceptionally harmful animals. First of all, the loss of calves in Nellim is highly significant and takes place on roughly the same scale every year. Second, most of the losses are caused by bears that are part of a sizeable group living in the Paatsjoki river valley. Between the years 2000 and 2008, the survival rate of calves in the Paatsjoki reindeer herding cooperative was 52 per cent; that is to say, almost half of the calves born disappeared in the forest before counting time in autumn. Over the same period, the survival rates for the four authors calves were 53 per cent (Kari Alatorvinen), 56 per cent (Eero Paadar), 58 per cent (Kalevi Paadar) and 58 per cent (Veijo Paadar). In contrast to these rates, the survival rate for the Ivalo cooperative as a whole is 66 per cent.

5.3 Even though the difference in calf survival rates between the Nellim group and the Cooperative does not look significant at first glance, it is enough to make it impossible for the Nellim herders to fulfil slaughter quotas set by the Cooperative. The Cooperative's rate of 66 per cent includes the much lower rates of the Nellim group, which means that the difference is greater than it appears to be.

5.4 In 2011, the Regional Council of Lapland issued a report on predators and their impact on reindeer herding. According to the report, because of the current number of predators, economically profitable reindeer husbandry has collapsed in the area of Lapland most affected by predators. The bear population in that area increased from 170 in 1995 to between 370 and 420 in 2010 (i.e. by 120 to 150 per cent). The real numbers may even be higher, as there are fewer people to record sightings of predators in northern Finland than in other parts of the country. The report also points out that damage occurring in summer, for example that caused by bears, is extremely difficult both to locate and to document, owing to a rapid utilization of carcasses by predators and scavengers, as well as processes of decomposition.

5.5 In relation to the new compensation system that is set up to cover losses of calves without any documentation being required, introduced pursuant to the Game Animal Damages Act 105/2009, the Regional Council points out that the operationalization of this instrument has proved to be inadequate and problematic. The authors contend that this statement contradicts the observation by the State party that the new system has clearly improved the position of reindeer owners because compensation sums have risen while damage has decreased. The Regional Council's report states that the slight decrease in damage that has taken place since the peak year of 2007 is the result of falls in reindeer numbers due to predators. According to a scientific study quoted by the Regional Council, slaughter volumes collapsed at the same time in parts of the southern and eastern reindeer husbandry areas that are subject to the most severe damage from predators. There are now 27 cooperatives that suffer from predator problems, which is nearly half of all the reindeer herding cooperatives in the State party.

5.6 The compensation system for calf losses introduced by the Game Animal Damages Act was not yet in force when the Ivalo cooperative's decisions on slaughter that are referred to in the present communication were taken. However, even if the compensation system worked properly, the problem raised by the authors would not be solved. The herders losing significantly more calves to predators than the majority in the Cooperative would still need to slaughter their productive base (i.e. their adult female reindeer) in order to fulfil their slaughter quota. Monetary compensation, even if substantial, could not replace the loss of livelihood. Furthermore, according to the report of the Regional Council, compensation for calf losses is in fact far from substantial and does not cover the real losses. For example, in 2011, in regard to the Paatsjoki cooperative, the compensated share of the total number of calves born was only 6 per cent, while the real annual loss of calves was close to 50 per cent.

5.7 The Ministry for Foreign Affairs requested the Sami Parliamentary Council to comment on the forced slaughter in the Nellim herding group. In its response, dated 23 March 2012, the Council states that the Reindeer Husbandry Act does not recognize Sami reindeer herding, despite the fact that, under section 17 (3) of the Constitution of Finland, the Sami people have a right to maintain and develop their own language and culture. Furthermore, the Government Bill on the Sami Parliament Act and the amendment to the Constitution state that reindeer herding, fishing and hunting are part of the Sami culture and traditional Sami livelihoods. The ruling of the Supreme Administrative Court focuses merely on the formal method of performing the reduction in the number of reindeer and fails to take a stand on the authors' main argument, namely that the Cooperative's decision on forced slaughtering violates article 27 of the Covenant. The authors have therefore been denied a fair trial, under article 14, paragraph 1, of the Covenant. The Sami Parliament is of the view that all Sami reindeer herders and members of their families must be able to practise reindeer husbandry in the Sami Homeland as part of their livelihood and culture and that inadequate national legislation obstructs or threatens this right. Through reindeer husbandry, Sami communities and the Sami language develop and remain viable. The authors' right to enjoy their own language is also violated by the Cooperative's decision on forced slaughter.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claim contained in a communication, the Human Rights Committee must decide, in accordance with rule 93 of its rules of procedure, whether or not the case is admissible under the Optional Protocol to the Covenant.

6.2 As required under article 5, paragraph 2 (a), of the Optional Protocol, the Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement.

6.3 The Committee observes that the State party has expressed no objections regarding admissibility and that domestic remedies have been exhausted. As all admissibility criteria have been met, the Committee declares the communication admissible and proceeds to its examination on the merits.

Consideration of the merits

7.1 The Human Rights Committee has considered the communication in the light of all the information made available to it by the parties, as provided under article 5, paragraph 1, of the Optional Protocol.

7.2 The Committee notes the authors' claim that their right to a fair trial under article 14, paragraph 1, of the Covenant has been violated because the Supreme Administrative Court rejected their appeal without weighing their legal claims, arguments and facts, and that by requesting a statement from the Government, the Court subordinated itself to the Executive. The Committee considers that the materials made available to it do not suggest that the courts acted arbitrarily in evaluating the facts and evidence in the authors' case or that the proceedings were flawed and amounted to a denial of justice. The Committee therefore does not find that the facts complained of constitute a violation of the authors' rights under article 14, paragraph 1, of the Covenant.

7.3 The authors claim to be victims of violations of articles 26 and 27 of the Covenant, in that the decisions on the forced slaughter of their reindeer taken in 2007 by the Ivalo Reindeer Herding Cooperative, in application of section 22 of the Reindeer Husbandry Act, had discriminatory effects on them. When deciding on the number of reindeer to be slaughtered in order to comply with the maximum permitted number of reindeer for the Cooperative and for each shareholder, the Cooperative did not take into consideration the authors' traditional Sami methods of herding or the fact that such methods involve the loss of greater numbers of calves. As a result, the reduction percentage imposed by the Cooperative on all stakeholders on the basis of their reindeer numbers at the beginning of the herding year had a negative impact on the authors, because at the time of slaughtering in autumn, their herds had been subjected to heavier losses than those of the other stakeholders, caused by predators.

7.4 The State party indicates that, according to the judgement of the Supreme Administrative Court, the Cooperative has Sami members who have fulfilled their slaughtering obligations. It thus appears that the present case does not concern unequal treatment between Sami and non-Sami herders, but rather differences between members of the Cooperative. The judgement shows that there are very different opinions concerning reindeer herding methods.

7.5 For the Committee, it is undisputed that the authors are members of a minority within the meaning of article 27 of the Covenant and, as such, have the right to enjoy their own culture. It is also undisputed that reindeer husbandry is an essential element of their culture. In this context, the Committee recalls its previous jurisprudence that economic activities may come within the ambit of article 27 if they are an essential element of the culture of an ethnic community. The Committee also recalls that, under article 27, members of minorities shall not be denied the right to enjoy their culture and that measures whose impact amounts to a denial of that right will not be compatible with the obligations under article 27.[4]

7.6 The Committee recalls paragraph 6.2 of general comment No. 23 (1994), which states:

> Although the rights protected under article 27 are individual rights, they depend in turn on the ability of the minority group to maintain its culture, language or religion. Accordingly, positive measures by States may also be necessary to protect the identity of a minority and the rights of its members to enjoy and develop their culture … in community with the other members of the group. In this connection, it has to be observed that such positive measures must respect the provisions of articles 2 (1) and 26 of the Covenant both as regards the treatment between different minorities and the treatment between the persons belonging to them and the remaining part of the population. However, as long as those measures are aimed at correcting conditions which prevent or impair the enjoyment of the rights guaranteed under article 27, they may constitute a legitimate differentiation under the Covenant, provided that they are based on reasonable and objective criteria.

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[4] Communication No. 511/1992, *Ilmari Länsman et al. v. Finland*, Views adopted on 26 October 1994, paras. 9.2 and 9.4; communication No. 671/1995, *Jouni E. Länsman et al. v. Finland*, Views adopted on 30 October 1996, para. 10.2; and communication No. 1023/2001, *Jouni Länsman et al. v. Finland*, Views adopted on 17 March 2005, para. 10.1.

7.7 In the present case, the authors claim that their calf losses are higher than those of the Ivalo group. However, the materials submitted to the Committee do not contain figures in that respect. The authors provide some figures on their reindeer numbers and the reduction imposed by the Cooperative with respect to 2010/11 but not with respect to 2007/08 and earlier years. It is also unclear what the progression was of the reductions imposed on their herds prior to 2007, how this compared to the reductions imposed on the other members of the Cooperative, and how, in concrete terms, they have come to a situation where all their reindeer have to be slaughtered. In the absence of information in that respect, the Committee is not in a position to conclude, given the limited evidence before it, that the impact of the Ivalo cooperative's reindeer reduction methods upon the authors was such as to amount to a denial of the authors' rights under articles 26 and 27. Despite this conclusion, the Committee deems it important to recall that the State party must bear in mind, when taking steps affecting rights under article 27, that although different activities in themselves may not constitute a violation of this article, such activities, taken together, may erode the rights of Sami people to enjoy their own culture.[5]

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it do not reveal a breach of articles 26 or 27 of the Covenant.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

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[5] Communication No. 671/1995, op. cit., para. 10.7.

Appendix

Individual opinion of Committee members Mr. Walter Kälin, Mr. Victor Manuel Rodríguez-Rescia, Ms. Anja Seibert-Fohr and Mr. Yuval Shany (dissenting)

We are unable to agree with the view rendered by the Committee that the facts before it do not reveal a breach of article 27 of the Covenant. We regret that the decision of the majority fails to sufficiently take into account the facts of the case. According to undisputed facts submitted by the authors, the board of the Ivalo Reindeer Herding Cooperative decided that the authors — members of the Nellim herding group — must slaughter all of their reindeer starting on 26 September 2011. The decision to slaughter the authors' reindeer results from the cooperative system established by the State under the Reindeer Husbandry Act of 1990. Pursuant to section 21 (1) of that Act, the Ministry of Agriculture and Forestry determines the maximum number of live reindeer that a reindeer herding cooperative may keep in its territory. Under section 22 (1) of the Act, if the number of live reindeer of a cooperative or a reindeer owner exceeds a maximum number, the cooperative must decide on the reduction of the number of reindeer to the maximum allowable number. If the owner does not reduce the number of his or her reindeer in accordance with the decision of the cooperative, the chair of the cooperative may decide that the cooperative will carry out the reduction on behalf of the owner. In the present case, the authors' complaint against the Cooperative's decision to carry out the reduction on behalf of the owner on the basis of the slaughter plan adopted by the Cooperative for the 2007/08 herding year was dismissed by Rovaniemi Administrative Court and the Supreme Administrative Court. As a result, the authors now face the slaughter of all of their reindeer.

Reindeer husbandry is an essential element of the authors' culture and is thus protected by article 27 of the Covenant, pursuant to which persons belonging to ethnic minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture. The Committee's approach in the past has been to inquire whether interference by the State party in that husbandry is so substantial that the State party has failed to properly protect the authors' right to enjoy their culture.[a]

In the present case, the slaughter of all their reindeer constitutes a particularly grave interference with the authors' rights under the Covenant, since it would deprive them of their livelihood which is essential for their ability to continue to enjoy their traditional culture. We recognize that this interference does not result from a direct order by an organ of the State party to slaughter their herds but is a consequence of the decision taken by the Ivalo Reindeer Herding Cooperative. However, under article 27 of the Covenant, a State party is not only under an obligation to refrain from taking measures that amount to a denial of the right of members of a minority to enjoy their culture but is also obliged to take positive measures of protection "against the acts of other persons within the State party".[b] In this regard, we accept that it is reasonable and consistent with article 27 of the Covenant to allow herding cooperatives to impose slaughtering quotas on its members in order to achieve the purposes of the Reindeer Husbandry Act to restrict the number of reindeer for economic and ecological reasons and to secure the preservation and well-being of the Sami minority.[c] However, in cases of an apparent conflict between the legislation, which seems to protect the rights of the minority as a whole, and its application to a single member of that minority, the Committee has been guided by the consideration that restrictions upon the right of individual members of a minority must be shown not only to have a reasonable and objective justification in the particular circumstances of the case but also to be necessary for the continued viability and welfare of the minority as a whole.[d] The State party has not shown that slaughtering all of the authors' animals was necessary in order to achieve this goal, nor does the material in front of the Committee allow us to conclude that in the present case the objective of restricting the number of reindeer could not have been achieved otherwise, and that attaining this objective justifies the decision to slaughter all of the authors' reindeer despite its substantial impact on the right of the authors to enjoy their culture. For these reasons, we conclude that the Committee should have found the State party to be in violation of its obligations under article 27 of the Covenant.

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[a] Communication No. 779/1997, *Äärelä and Näkkäläjärvi v. Finland*, Views adopted on 24 October 2001, para. 7.5.

[b] General comment No. 23 (1994), para. 6.1.

[c] See communication No. 197/1985, *Kitok v. Sweden*, Views adopted on 27 July 1988, para. 9.5.

[Done in English. Subsequently to be issued also in Arabic, Chinese, French, Russian and Spanish as part of the present report.]

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[d] Ibid., para. 9.8; and communication No. 24/1977, *Lovelace v. Canada,* Views adopted on 30 July 1981, para. 16.

LL. Communication No. 2104/2011, *Valetov v. Kazakhstan* (Views adopted on 17 March 2014, 110th session)*

Submitted by:	Nikolai Valetov (represented by counsel, Anastasia Miller)
Alleged victim:	The author
State party:	Kazakhstan
Date of communication:	13 September 2011 (initial submission)
Subject matter:	Extradition to Kyrgyzstan
Procedural issue:	Compliance with the Committee's interim measures request; non-substantiation; non-exhaustion of domestic remedies
Substantive issues:	Refoulement; fair trial
Articles of the Covenant:	7; 14, paragraph 3
Article of the Optional Protocol:	1; 2; 5, paragraph 2 (b)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 17 March 2014,

Having concluded its consideration of communication No. 2104/2011, submitted to the Human Rights Committee by Nikolai Valetov under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

Views pursuant to article 5, paragraph 4, of the Optional Protocol

1.1 The author of the communication is Nikolai Valetov, a national of the Russian Federation, born on 9 May 1952. At the time of submission, he was detained in Kazakhstan and subject to an extradition request to Kyrgyzstan. He submitted that if Kazakhstan proceeded with his extradition to Kyrgyzstan he would be arrested and tortured in violation of article 7 of the International Covenant on Civil and Political Rights. He also alleged to be a victim of violations by Kazakhstan of his rights under article 14, paragraph 3 of the Covenant.[1] The author is represented by counsel, Anastasia Miller of the Kazakhstan International Bureau for Human Rights and Rule of Law.

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* The following members of the Committee participated in the examination of the present communication: Mr. Yadh Ben Achour, Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Walter Kälin, Ms. Zonke Zanele Majodina, Mr. Gerald L. Neuman, Sir Nigel Rodley, Mr. Victor Manuel Rodríguez-Rescia, Mr. Fabián Omar Salvioli, Ms. Anja Seibert-Fohr, Mr. Yuval Shany, Mr. Konstantine Vardzelashvili, Ms. Margo Waterval and Mr. Andrei Paul Zlătescu.

[1] The Optional Protocol entered into force for the State party on 30 September 2009.

1.2 On 27 September 2011, pursuant to rule 92 of the Committee's rules of procedure, the Committee, acting through its Special Rapporteur on new communications and interim measures, requested the State party not to extradite the author while his case is under consideration by the Committee. On 14 October 2011, the Committee received information that the extradition of the author was imminent and reiterated the request for interim measures to the State party. On 21 October 2011, the Committee received information indicating that the author had been extradited to Kyrgyzstan on 14 October 2011. On the same date, the Committee requested the State party to provide clarification as to the whereabouts of Mr. Valetov.

The facts as presented by the author

2.1 The author submits that, in 2001, he was living in Kyrgyzstan in the home of his niece Antonina Churakova, who had an intimate relationship with a police officer and often hosted "parties" at which police officers gathered to drink. He tried to forbid those gatherings and entered into conflict with some of the police officers. In June 2001, he witnessed his niece murdering her mother-in-law, during a visit to the latter's home.

2.2 The author submits that immediately after the murder he was arrested and accused of the murder and a number of other crimes. He maintains that the criminal charges against him were faked by the Kyrgyzstan police. The author submits that, while in detention, he was tortured: he was handcuffed and hung by the handcuffs, beaten, his fingers were burned, a gas mask was placed on his head and the airholes were repeatedly blocked, he was threatened with rape with a truncheon, he was subjected to electric shocks through his genitalia. The beatings were so severe that his scrotum was "destroyed" and he became an invalid. The author claims that he requested an examination by a doctor several times, but did not receive any medical attention.

2.3 On 23 August 2001, the author escaped from the detention centre in Kyrgyzstan and managed to illegally cross the Kyrgyz border into Kazakhstan. The author submits that he approached a police officer and requested protection and assistance in contacting the Russian Federation authorities. The police officer took away his Russian Federation passport and military ticket and the documents disappeared. From that moment, the authorities instituted proceedings against the author as if he was a citizen of Kazakhstan. He was arrested and charged with numerous crimes[2] allegedly committed in Kazakhstan. On 3 February 2003, the Ryskulovski District Court, among other crimes, convicted the author of theft and robbery, and sentenced him to 16 years' imprisonment. Following numerous appeals the sentence was reduced to 7 years' imprisonment. The author was placed in a correctional colony, from which he escaped in April 2004. After that, at an unspecified date, he returned to Kyrgyzstan.

2.4 On an unspecified date, the author was arrested in Kyrgyzstan after committing a theft. He stated that his name was Tytuyshny and he was convicted for theft under that name. He was released from prison in 2005 following an amnesty and returned to Kazakhstan in January 2006. On an unspecified date, he was arrested and a certificate that he was citizen of Kazakhstan was issued. The author submits that the 2001 Kyrgyzstan case had been transmitted to the Kazakhstan law enforcement by Kyrgyzstan in 2002 and that the Kazakh authorities intended to try him on charges related to the 2001 events in Kyrgyzstan, which they would have been entitled to do, if he was a Kazakh citizen. His protests that he was a citizen of the Russian Federation were initially rejected, but, following extensive legal proceedings, on 19 August 2008, information was received from the Russian Federation authorities, confirming that he was a Russian Federation citizen. Based on that information the Kazakhstan authorities transferred the 2001 criminal case to the Kyrgyzstan justice system.

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[2] The author was charged with crimes under articles 178, paragraph 2 (Robbery), 175, paragraph 2 (Theft), and 259 (Illegal purchase, transportation or storage for the purposes of marketing, manufacture, processing, shipment or selling of narcotic substances or psychotropic substances).

2.5 The author was serving the remainder of his prison term in Kazakhstan and was due to be released on 15 July 2011. However, on 11 July 2011, based on a request for extradition from the Office of the Prosecutor General of Kyrgyzstan, the Kostanay Prosecutor ordered that the author be placed under "extradition remand" for 40 days, based on article 534 of the Code of Criminal Procedure of Kazakhstan. On 21 July 2011, the Kostanay District Court confirmed the detention order; on 18 August 2011, the Prosecutor ordered and the Court confirmed that the detention should be extended until 15 September 2011; on 31 August 2011 the Kostanay District Court confirmed that decision as well.

2.6 On 23 August 2011, the Office of the Prosecutor General took a decision to grant the extradition request against the author. His appeal before the Kostanay District Court was rejected on 21 September 2011. His further appeal to the Kostanay District Court was also rejected. The author submits that the latter decision was final, and no further appeal was possible and that, in accordance with the decision of the Office of the Prosecutor General of Kazakhstan, dated 23 August 2011, he was liable to be extradited to Kyrgyzstan. The author contends that he has exhausted all available and effective domestic remedies.

The complaint

3.1 The author submits that his extradition to Kyrgyzstan would lead to his arrest and torture. He maintains that because he was tortured in Kyrgyzstan before, and because he escaped from a detention centre there, the risk of torture is imminent. He claims that the Kazakhstan authorities are aware of the fact that he had been tortured and that torture in Kyrgyzstan is applied routinely and that, if they extradite him, they would be violating article 7 of the Covenant.

3.2 The author also alleges violations of the domestic criminal procedure, which led to violations of his rights under article 14, paragraph 3 of the Covenant. Specifically, the author submits that during the extradition proceedings, on 11 July 2011, he was not allowed to meet with his lawyer. He also requested and was denied meetings with his lawyer on 18 July 2011 and 19 July 2011, and his numerous complaints in that regard were ignored.

The State party's observations on admissibility and merits

4.1 On 9 November 2011, the State party submits that, on 14 October 2011, the author had been handed over to the law enforcement authorities of Kyrgyzstan following an extradition request of the Office of the Prosecutor General of Kyrgyzstan. The latter had presented to the State party guarantees for the respect of the author's human rights, including the assistance of lawyers, the "non-application of torture", in accordance with the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and other guarantees. The State party also submits that the author was handed over to the Kyrgyzstan authorities before the Office of the Prosecutor General of Kazakhstan had received the material concerning his appeal to the Human Rights Committee.

4.2 On 25 November 2011, the State party submits that the Office of the Prosecutor General of Kazakhstan by a decision of 23 August 2011 granted the request of the Office of the General Prosecutor of Kyrgyzstan to hand over the Russian citizen Valetov Nikolai Egorovich in order to be tried for the commission of crimes under article 168, paragraphs

2.2, 2.4 and 3.3; article 97, paragraphs 2.3, 2.6, 2.8, 2.15; and article 336, paragraphs 1 and 2.1, of the Criminal Code of Kyrgyzstan[3] and in order to complete the serving of a sentence (1 year and 26 days remaining), imposed by a verdict of the Chuysky Regional Court of 16 March 2005. At the same time, extradition was refused for the purpose of trying the author for the commission of crimes under article 164 of the Criminal Code (theft) because the statute of limitations had expired; under article 168, paragraph 3.1 (robbery committed by a person previously convicted for theft, extortion or banditry) and 259, paragraph 1 (acquisition and storage of narcotic drugs or psychotropic substances without the purpose of sale), because the equivalent crimes had been excluded from the Criminal Code of Kazakhstan; and under article 348, paragraph 2 (theft of a passport or any other important personal document from an individual), because it was not punishable by imprisonment. The said decision was appealed by the author and his appeal was rejected by a decision of Kostanay Municipal Court No. 2 of 21 September 2011. The author further appealed the court decision to the Kostanay Regional Court, which rejected his appeal on 6 October 2011. Accordingly, the extradition decision entered into force and, on 14 October 2011, the author was handed over to the law enforcement bodies of Kyrgyzstan.

4.3 The State party submits that it recognizes the competence of the Human Rights Committee under the Optional Protocol to consider communications from individuals who claim to be victims of a violation by that State party of any of the rights set forth in the Covenant. Further, the State party does not aim to violate its obligations under the Optional Protocol and does not consider the Committee's opinion nugatory and futile, in particular regarding the implementation of rule 92 of the Committee's rules of procedure. In the instant case there was "an unfortunate misunderstanding". The letter from the Ministry of Foreign Affairs, relating the Committee's request not to extradite the author did not reach the Office of the Prosecutor General until 19 October 2011, after the extradition had already taken place.

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[3] The relevant articles read in pertinent parts:

"Article 97. Murder

...

(2) Murder: ...

3) Of a person know to the perpetrator to be in a helpless situation or of a minor; ...

6) With particular cruelty; ...

8) For mercenary motives or because hired, or connected with robbery, extortion or banditry; ...

15) By a group of persons by conspiracy".

"Article 168. Robbery

...

(2) The same crime, if committed: ...

2) By a group of persons by conspiracy; ...

(4) The same crime, if committed: ...

4) With entry into a dwelling, premises or other place of storage; ...

(3) The same crime, if committed: ...

3) With infliction of grievous bodily harm on the victim ...

(4) The same crime, if committed: ...

4) With entry into a dwelling, premises or other place of storage".

"Article 336. Escape from a place of detention or custody

(1) Escape from a place of detention, or custody of a person who is serving a sentence or in pretrial detention, shall be punishable by deprivation of liberty for a term of up to three years;

(2) The same act committed: by a group of persons by conspiracy; by an organized group; with the use of violence dangerous for life or health of other persons or with the threat of using such violence; with the use of weapons or objects used as weapons, shall be punishable by deprivation of liberty for a term of three or eight years."

4.4 The State party also submits that, following the author's complaints dated 29 June 2011 and 27 July 2011 regarding torture and ill-treatment while in detention in Kyrgyzstan,[4] the Office of the Prosecutor General of Kazakhstan addressed requests to present guarantees that the author shall not be subjected to torture and verifying the lawfulness of the prosecution against him. On 8 August 2011, a reply was received from the Office of the Prosecutor General of Kyrgyzstan, stating that it guarantees that the author will be granted all possibilities to defend himself, including the assistance of lawyers, that he will not be subjected to torture and other cruel, inhuman and degrading treatment or punishment, in accordance with the Convention against Torture, and that allegations that law enforcement officers conducted unlawful activities during the investigation into the author had been subjected to verification and "could not be confirmed". Further, on 26 October 2011, a request was sent to the Office of the Prosecutor General of Kyrgyzstan to allow representatives of the diplomatic or consular mission of Kazakhstan to meet with the author in order to verify that the guarantees are being respected. The Office of the Prosecutor General of Kyrgyzstan responded that it does not object to such meeting. The State party submitted that the meeting will be organized shortly and that it will inform the Committee of its outcome.

4.5 The State party submits that the author's communication should be declared inadmissible because he failed to exhaust all available remedies in accordance with article 5, paragraph 2 (b), of the Optional Protocol. In particular, the State party maintains that the author started making unfounded allegations that he had been tortured by the law enforcement bodies of Kyrgyzstan after he found out that they had requested his extradition for crimes committed on the territory of Kyrgyzstan. The author did not present to the Committee any evidence, such as judicial acts regarding torture or medical certificates, since no such documents exist. There are no complaints or petitions regarding the violations of his right to defence or torture addressed to the Kazakhstan courts by the author. A conclusion may be made that the arguments of the author regarding torture are based on a mere possibility, are only suppositions and suspicions and lack any solid arguments and facts. The State party deems that the author's allegations that he became an invalid as a result of being tortured by Kyrgyz law enforcement officers were motivated by the desire to prevent the extradition at all cost. Nonetheless, the above facts will be subjected to verification by the Kazakhstan authorities: in the near future a request for a medical examination of the author will be sent to the Office of the Prosecutor General of Kyrgyzstan. According to medical documentation regarding the author's health, obtained from the penitentiary institution where the author served his sentence in Kazakhstan, he was only suffering from "general illnesses", such as bronchitis, tonsillitis, problems with the ears and haemorrhoids.

Further submissions from the author

5.1 On 28 November 2011, the author submitted that he had been extradited to Kyrgyzstan despite the Committee's interim measures request and charged with serious crimes under articles 97, 168 and 336 of the Criminal Code of Kyrgyzstan. He submits that he had already been questioned once, that he fears that he will not be given a fair trial and might be subjected to torture again. He believes that it is the objective of the Kyrgyz authorities to convict him and sentence him to long-term imprisonment and that the domestic procedures do not give him a realistic opportunity to protect himself, since they are not in line with the Covenant.

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[4] Copies of these complaints had not been submitted by the State party.

5.2 On 9 December 2011, the author submits that by handing him over to the Kyrgyz authorities despite the Committee's request for interim measures, the State party had violated article 1 of the Optional Protocol. In both submissions, he informs the Committee that he submitted complaints to the Russian Federation Embassy, the Office of the Prosecutor General and the Ombudsman.

Author's comments on the State party's observations

6.1 On 19 March 2012, counsel submits that, already in April 2009, the author had complained to the Kazakhstan International Bureau for Human Rights and Rule of Law that, in June 2001, he had been subjected to torture in Kyrgyzstan but that they had refused to listen to his allegations. After he was convicted to 16 years' imprisonment in Kazakhstan, he filed multiple complaints with different bodies, including regarding the torture he experienced in Kyrgyzstan.[5]

6.2 The author submits that, despite his torture allegations, no forensic medical experts were ever appointed to him, but he maintains that his body still bears the scars resulting from torture.

6.3 When he was detained in 2001, the author informed the Kazakhstan police that he was a citizen of the Russian Federation and requested contact with the nearest representative of the Russian Federation. The officer, however, destroyed his Russian Federation passport and military card. The author repeatedly complained to the Prosecutor's office regarding that violation of his rights, but without success. For example, on 20 July 2007, the Dzhambysky District Prosecutor responded to the author's complaint that, according to the documents in the court case file, the author was a citizen of Kazakhstan and he saw no reason to initiate an investigation. In October 2008, the Karaganda Prosecutor responded that the author's allegation of his illegal conviction and the destruction of his identity documents were unfounded. However, in November 2008 the Migration Police Directorate stated that the author was a citizen of the Russian Federation. The above confirms that no effective investigation of his allegations took place. On 6 August 2009, the Kazakhstan International Bureau for Human Rights and Rule of Law sent a request to the Office of the Prosecutor General of Kazakhstan to investigate the destruction of his identity documents and to prosecute the responsible individuals, but it received no response.

6.4 On 11 July 2011, Kostanay Municipal Court No. 2 allowed a 40-day extradition remand of the author following an extradition request from Kyrgyzstan. The extradition remand was extended on three occasions until 15 October 2011. The author submits that, in the ruling extending his extradition remand, dated 8 September 2011, and the 21 September 2011 decision rejecting his appeal of the decision to extradite him, the Kazakhstan courts violated the presumption of innocence, because they referred to him as having committed crimes.

6.5 The author further submits that, when he was extradited on 14 October 2011, he was in possession of the Committee's letter, informing him that a request not to extradite him had been made under rule 92 of the Committee's rules of procedure, but that document was ignored by the officers in the detention centre in Kazakhstan.

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[5] The submission does not specify to which institutions/courts the author complained.

6.6 With regard to the State party's submission that an "unfortunate misunderstanding" occurred in his case, because the Committee's request did not reach the Prosecutor's office until 19 October 2011, 23 days after it was issued, the author maintains that this argument is not valid, since the State party had the request for interim measures, but still proceeded with his extradition. He maintains that the State party was aware of the author's allegations that he is at risk of torture or inhuman or degrading treatment and that as a minimum it should have properly assessed that risk, at the time of the extradition, taking into consideration his testimony, information regarding the use of torture in Kyrgyzstan from non-governmental organization and it should have conducted a medical examination in accordance with the Manual on Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol). The author further maintains that the assurances provided on 8 August 2011 by the Office of the Prosecutor General of Kyrgyzstan for the respect of the author's rights did not contain any concrete guarantees nor a mechanism for the monitoring of the implementation of those assurances.[6] He maintains that the document is an insufficient guarantee for his rights and it proves that the assurances are not taken seriously and that a real risk exists for the author. He further notes that the State party did not present any documents proving that they verified the implementation of the above guarantees.

6.7 The author maintains that neither the authorities of Kazakhstan nor the authorities of Kyrgyzstan had conducted a proper investigation into his torture allegations as required by the Istanbul Protocol. He could not participate in the investigation procedure, he was never questioned regarding the violations of his rights and no expert medical examination was ever conducted. The "verification" was purely a formality and was not aimed at establishing responsibility and finding and punishing the perpetrators. Only after extraditing the author did the State party start mentioning the possibility of visiting him and requesting a medical examination. The author maintains that these questions should have been raised before his extradition.

6.8 The author notes that, in his complaints, he made references to the *2009 World Report* of Human Rights Watch[7] and the report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, from his 2011 mission to Kyrgyzstan (A/HRC/19/61/Add.2), which state that the use of torture and ill-treatment to extract confessions remains widespread, there is a serious lack of sufficiently speedy, thorough and impartial investigation into allegations of torture and ill-treatment and the general conditions in most places of detention visited amount to inhuman and degrading treatment.

6.9 The author submits that implicit in a State's adherence to the Optional Protocol is an undertaking to cooperate with the Committee in good faith so as to permit and enable it to consider such communications, and after examination to forward its views to the State party and to the individual. It is incompatible with these obligations for a State party to take any action that would prevent or frustrate the Committee in its consideration and examination of the communication, and in the expression of its Views. He notes that the Committee has repeatedly noted that a State party commits grave breaches of its obligations under the Optional Protocol if it acts to prevent or frustrate consideration by the Committee of a communication alleging a violation of the Covenant, or to render examination by the Committee moot and the expression of its Views nugatory and futile.[8] He submits that he complained to the State party that his rights under article 7 will be violated if he is extradited to Kyrgyzstan. The State party was informed of that, but it proceeded with his extradition before the Committee could finalize its review of the case and issue its Views. The author also refers to the Committee's Views on communication No. 2024/2011, *Israil v. Kazakhstan*, where the Committee recalled that interim measures pursuant to rule 92 of the Committee's rules of procedure adopted in conformity with article 39 of the Covenant, are essential to the Committee's role under the Optional Protocol and that flouting of the rule, especially by irreversible measures such as the author's extradition undermines the protection of Covenant rights through the Optional Protocol.[9] The author submits that he had been subjected to torture in Kyrgyzstan and that the Kazakh authorities knew about that; that he had a copy of the Committee's letter requesting interim measures; and that he had provided reports regarding the general human rights situation in Kyrgyzstan. More than two weeks had passed after the request for interim measures had been received, but the author was still handed over to a country where real risk of torture or cruel treatment existed. He reiterates that the above violated his rights under article 7 of the Covenant.

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[6] The author refers to the Committee's jurisprudence in communications Nos. 1461/2006, 1462/2006, 1476/2006 and 1477/2006, *Maksudov et al v. Kyrgyzstan*, Views adopted on 16 July 2008, para. 12.5.

[7] Available from www.hrw.org/sites/default/files/reports/wr2009_web.pdf.

[8] The author makes reference to the Committee's jurisprudence in in communications No. 1461/2006, 1462/2006, 1476/2006 and 1477/2006, *Maksudov et al v. Kyrgyzstan*, para. 10.2.

Additional information by the State party

7.1 On 22 March 2012, the State party reiterates that the Office of the Prosecutor General of Kazakhstan by a ruling of 23 August 2011 granted the request of the Office of the Prosecutor General of Kyrgyzstan to extradite the author.

7.2 With regard to the author's allegations that he was unlawfully and without grounds tried and convicted by the Kazakhstan courts, the State party submits that the author had been convicted on 3 February 2003 by the Ryskulovsky District court for crimes under article 175, part 2, paragraphs (a) and (b), article 178, part 2, paragraphs (a), (b) and (c), and article 259, part 2, of the Criminal Code of Kazakhstan. The State party restates the content of the verdict and submits that the verdict was appealed and recognized as lawful and well grounded. The author was placed in Correctional Colony AK-159/20 on 16 April 2004 to serve his sentence, but on 4 May 2004 he did not return to the colony at the required time and went into hiding. He was placed on the list of wanted individuals and he was eventually arrested. On 16 January 2007, he was convicted under article 359 of the Criminal Code of Kazakhstan (evasion of punishment in the form of imprisonment) and sentenced to five years and three months' imprisonment.

7.3 The State party submits that, in 2002, it received from Kyrgyzstan a criminal case against the author with charges of murder, theft, illegal possession of narcotics, banditry and theft of documents. While he had been under arrest pending investigation of the above crimes, the author escaped from the detention centre in Kyrgyzstan on 23 August 2001. Separate charges were brought against the author regarding the escape from the detention centre and he was placed on a wanted list. The author was found on the territory of Kazakhstan, serving a sentence following a conviction by a Kazakh court, and the above Kyrgyz criminal case was transmitted to the Kazakh authorities in accordance with the Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters (the Chisinau Convention) of 7 October 2002.

7.4 The State party further submits that, on 23 May 2007, another criminal case on charges of escaping from a penitentiary in Kyrgyzstan against N.V. Tytryshny was transferred from Kyrgyzstan to Kazakhstan. The convict had escaped from the penitentiary 1 year and 26 days before the end of the sentence. Through comparison of fingerprints it was established that N.V. Tytryshny and the author are the same person. On that basis, the two cases were joined. In 2008, however, it was established that the author is a citizen of the Russian Federation and, accordingly, in accordance with articles 192 and 528 of the Code of Criminal Procedure of Kazakhstan, the above cases fall outside the Kazakhstan jurisdiction. Accordingly, the cases were returned to the Kyrgyzstan authorities.

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[9] Views adopted on 31 October 2011, para. 7.3.

7.5 The State party submits that, in accordance with article 85 of the Convention,[10] Kyrgyzstan is obliged to report regarding the outcome of the criminal prosecution against the extradited individual, but at the time of the submission the Kyrgyzstan court had not yet reviewed the charges against the author on the merits. The State party proceeds to reiterate its submission of 25 November 2011 (see paras 4.2–4.5 above).

7.6 The State party further submits that, following its request, the Kyrgyzstan authorities conducted a medical examination of the author in order to verify the traces of torture. It submits that, according to the conclusion of the examination, dated 11 January 2012, no injuries including to the external genitals of the author, had been discovered. The State party further submits that, on 22 December 2011, representatives of the Kazakhstan Embassy met with the author in the detention centre in Bishkek and established that his health and living conditions were in good condition and "facts of torture were not confirmed".

7.7 Regarding the author's allegations that, as a citizen of the Russian Federation, he should not be extradited, the State party clarifies that the Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Matters does not prevent the State party from extraditing the author to his country of origin or to a third country and that, in the latter case, the consent of his country of citizenship is not required.

Further submissions by the author

8.1 On 17 May 2012, the counsel of the author reiterates all arguments submitted on 19 March 2012. Counsel further states that she has no contact with the author, that she has not received a copy of the conclusion of the medical expert examination, allegedly conducted on 11 January 2012, and that she cannot assess whether it was competent and complete. She further submits that such an examination should have been conducted before and not after the extradition.

8.2 Regarding the conviction of the author by the Ryskulovsky District Court in Kazakhstan in December 2001, counsel submits that the author had stated that he had been forced to sign a confession through the application of psychological pressure and torture, and proceeds to argue that some of the other evidence against the author was not conclusive. She submits that the author appealed the verdict before the Dzambylansky Regional Court and that, on 7 March 2002, the latter issued a decision striking from the verdict some of the charges and reducing the verdict to 12 years' imprisonment. The author filed a further appeal to the supervisory review chamber of the same court, which revoked the previous decisions and returned the case for a retrial before a different judicial panel. The retrial took place on 6 October 2002, and the author was convicted to nine years' imprisonment. The author appealed the new verdict before the Dzambylansky Regional Court and the latter revoked the verdict and returned the case for a retrial once more. On 2 March 2003, the author was convicted to eight years' imprisonment. Following the author's appeal on 20 March 2003, the supervisory review chamber of the Dzambylansky Regional Court amended the verdict, reducing the sentence to seven years' imprisonment.

8.3 Counsel reiterates that the author's rights under article 7 of the Covenant had been violated because the State party did not comply with the Committee's request for interim measures.

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[10] It is not clear from the submission to which Convention the State party refers.

8.4 On 7 November 2012, counsel submits that, on 10 October 2012, she received a statement from the author, dated 10 September 2012, in which he alleged that, on 24 April 2012, while he was in a detention centre in Kayyngdy, he was subjected to physical violence and that special food that he had received for the celebration of an Orthodox holiday was destroyed by the guards. He also stated that the detention cells in the detention centre lacked toilets and that he was given drinking water in bottles, but these were taken away after a period of time. He alleged that he complained regarding the conditions of detention to the prosecutor's office and to the President, but that all his complaints were ignored. On 11 May 2012, in protest against the repeated use of torture, the lack of investigation into his torture allegations, the "illegal extradition" to Kyrgyzstan and numerous other violations of his human rights, the author "sewed his mouth", and started an indefinite "dry" hunger strike. Later, on an unknown date, the author began to drink water. On 6 June 2012, the counsel of the author was notified of the hunger strike. On 22 October 2012, the author informed his counsel that, during the hunger strike, he was not visited by any attorney, nor by representatives of Kazakhstan or by the prosecutors' office of Kyrgyzstan. Reportedly he had been transferred to a medical unit in mid-October 2012, but he was not receiving proper care and supervision; his weight was not controlled and it was unclear if he was provided with enough water.

8.5 Counsel submits that the author is unable to freely communicate with her. The author also alleges that the conditions of his detention violate of articles 7 and 10 of the Covenant, including through the lack of proper medical care and the lack of access by the defence.

8.6 Counsel submits that Kazakhstan has repeatedly "failed to fulfil its obligations in the present case" by not holding regular meetings or monitoring the human rights of the author, and not reacting to the allegations of torture, actions that it was supposed to conduct according to the "diplomatic assurances" concluded between Kazakhstan and Kyrgyzstan.

8.7 Counsel submits that, owing to the fact that the author has been on hunger strike since 11 May 2012, but also due to the refusal of the Kyrgyz authorities to provide adequate medical care to him, there is a direct threat to the life and safety of the author. Counsel requests the Committee to issue an interim measures request, namely that representatives of the Embassy of Kazakhstan urgently visit the author, ensure a medical examination of his health by independent doctors and, if necessary, require the provision of adequate health care for the preservation of his life and security, in accordance with the Declaration on Hunger Strikers (Declaration of Malta);[11] in line with the obligations assumed under the Covenant and the previously obtained assurances from the authorities of Kyrgyzstan, that the Kazakhstan authorities request the Office of the Prosecutor General of Kyrgyzstan to conduct an efficient, thorough and independent investigation into the torture allegations of the author; that the Kazakhstan authorities develop mechanisms for effective and constant visits to ensure up-to-date, full and accurate information about the human rights' situation of the author; and that the State party inform the Human Rights Committee of the action taken to prevent irreparable damage to the life and health of the author.

The Committee's request for information

9. On 9 November 2012, the Special Rapporteur on new communications and interim measures requested the State party to provide the Committee with up-to-date information regarding the author's whereabouts and health condition, in view of the agreement between Kazakhstan and Kyrgyzstan, allowing Kazakhstan to monitor the situation of the author

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[11] Adopted by the 43rd World Medical Assembly, Malta, November 1991, and editorially revised at the 44th World Medical Assembly, Marbella, Spain, September 1992.

after the extradition. He also requested information on the measures taken to comply with this request no later than 9 December 2012.

State party's further submission

10.1 On 18 December 2012, the State party submits that, according to information it received from the Office of the Prosecutor General of Kyrgyzstan, the author had been tried by the Panfilovsky District Court of the Chuysky Region and, on 26 April 2012, he had been convicted for crimes under articles 97, 168 and 336 of the Criminal Code of Kyrgyzstan and sentenced to 16 years' imprisonment. On 15 May 2012, the author appealed the verdict and his appeal was still under review. The State party submits that, on 9 November 2012, a forensic psychological examination was ordered in relation to the verification of his torture allegations. Since the author was on hunger strike and his health was deteriorating, the examination was postponed until 21 November 2012. However, the author sewed his own mouth and refused to participate in the psychological examination. On 23 November 2012, in the presence of the Deputy Prosecutor of Panfilovsky District, a medical examination of the author and a "discussion" took place. The conclusion of the above psychological medical examination was that that it did not reveal any injuries to the author, and that he is currently suffering from third-degree hypertonia. At the time of the submission, the author was continuing his hunger strike and had been placed in the medical unit and was receiving medical assistance. The State party disputes the counsel's submission that the author had not been receiving proper medical attention since, according to the log for emergency medical assistance to the detainees on 16 and 17 April 2012, the author had complained of headaches, arrhythmia and dizziness, an ambulance was called and he had received assistance.

10.2 Regarding the author's complaint that, on 24 April 2012, he and other detainees were subjected to physical violence by some detention centre employees and police officers, the allegations had been investigated, other detainees and guards had been questioned and they disagreed with the author's version of the events. A decision was taken not to initiate a criminal prosecution against the guards, that decision was confirmed upon appeal and the author was duly informed of the outcome of his complaint. The State party submits that, since none of the author's torture allegations have been confirmed, his complaint against Kazakhstan was unfounded.

10.3 Regarding the author's complaint that he had not been visited by Kazakhstan representatives, the State party submits that the detention centre where the author is detained is checked on weekly basis by the Prosecutor's office responsible for the supervision of the lawfulness in the correctional institutions, which notes the results in a journal, that could be requested by the Kazakhstan authorities and transmitted to the Committee if necessary. The State party further submits that representatives of its Embassy have not visited the author in Kyrgyzstan to date, since they had not received permission to do so from the Ministry of Foreign Affairs of Kyrgyzstan.

Further submissions from the parties

11.1 On 15 February 2013,[12] counsel submits that the author informed her that, on 31 January 2013, he was informed by the head of the medical service of the detention centre in Bishkek that he is suffering from tuberculosis and, subsequently, he was transferred to the correctional colony in the village of Moldovanovka (IK 31), where detainees with this diagnosis are held. He confirmed that he continues his hunger strike and that he is only taking sweet tea and chicken broth; he refuses infusions and medication, since he does not trust the personnel in the detention centre. The author had sewn his mouth with thread, but it rotted, so he replaced it with wire, which was forcibly removed by the personnel of the detention centre on 31 January 2013. He stated that he would terminate the hunger strike if he is provided with a lawyer to defend his rights against the charges brought against him.

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[12] Since the counsel for the author is in Kazakhstan, she made an agreement with a lawyer in Kyrgyzstan to visit the author and transmit information from him regarding the case.

11.2 Regarding the events of 24 April 2012, the author submits that he was taken to an interrogation room, where there were several police officers, who stated that they remembered him from 2001, when he complained about them and proceeded to punch him in the head, kidneys and legs. He sustained bruises and bumps. On 26 April 2012, he attempted to complain to a judge, but the latter refused to initiate proceedings. The author maintains that the investigation of the incident was inadequate: detainees who were also ill-treated by the police officers were not questioned, despite the fact that the author provided their names, and a medical examination was not conducted in a timely manner. The decision not to initiate criminal prosecution against the perpetrators was not taken until 24 November 2012. The author maintains that Kyrgyzstan failed to conduct a thorough investigation and Kazakhstan failed to insist that a thorough investigation was conducted.

11.3 With regard to the expert medical examination, the author submits that, on one occasion, on 23 November 2012, he was taken on a stretcher for medical examination. The Deputy Prosecutor of the Panfilovsky Region was there as well as the town's forensic medic. The latter did not examine the author, but simply asked him a few questions. The author maintains that he was not offered a psychological examination and that he never refused to undergo one. At the time of the submission, the author was able to move only with crutches and was suffering from exhaustion, high blood pressure and coronary disease.

11.4 Based on the above and the State party's submission that its diplomatic representation cannot visit the author, the author disputes the State party's assertion that his rights were not violated and maintains that his extradition violated the obligations of Kazakhstan under article 7 of the Covenant.

11.5 On 27 February 2013, the State party reiterates its submission from 18 December 2012 (see paras. 10.1–10.3 above).

11.6 On 23 April 2013, the counsel for the author submits that she has lost contact with him, but maintains that the State party's submission does not bring any new information and that Kazakhstan had violated its obligations under article 7 of the Covenant.

11.7 On 14 August 2013, the State party reiterates its submission regarding the criminal proceedings against the author (see para. 10.1 above) and submits that, according to information it received from the Office of the Prosecutor General of Kyrgyzstan on 30 July 2013, the 26 April 2012 verdict against the author was revoked on 12 June 2013 by a decision of the Chuysky Regional Court and returned to the first instance court for a retrial. On 24 July 2013, the prosecution filed a request for a supervisory review of the 12 June 2013 decision, which is still under review. It further submits that a meeting of the author with Kazakh diplomatic representatives is being planned.

11.8 On 9 September 2013, the counsel for the author submits that the State party's submission does not contain any new arguments and that she maintains the previous submissions of the author.

Issues and proceedings before the Committee

Non-respect of the Committee's request for interim measures

12.1 The Committee notes that the State party extradited the author although his communication had been registered under the Optional Protocol and a request for interim measures of protection had been addressed to the State party in this respect. The Committee recalls[13] that, by adhering to the Optional Protocol, a State party to the Covenant recognizes the competence of the Committee to receive and consider communications from individuals claiming to be victims of violations of any of the rights set forth in the Covenant (Preamble and article 1). Implicit in a State's adherence to the Protocol is an undertaking to cooperate with the Committee in good faith so as to permit and enable it to consider such communications, and after examination to forward its views to the State party and to the individual (art. 5, paras. 1 and 4).[14] The Committee takes note of the State party's submission that the letter from the Ministry of Foreign Affairs did not reach the Office of the Prosecutor General until the extradition had taken place. The Committee observes, however, that its request had been transmitted to the Permanent Mission of the State party on 27 September 2011. The request was reiterated on 14 October 2011, after receiving information that the extradition of the author was imminent. Despite that, the extradition still took place on 14 October 2011. It is an obligation of the State party to organize the transmittal of the Committee's requests to the responsible authorities within its territory in a way that would allow the Committee's request to be implemented in a timely manner. The Committee further notes author's uncontested submission that, by the time of extradition, he was in possession of the Committee's letter and that he alerted officers in the detention centre about the request made by the Committee under the rule 92 of the Committee's rules of procedure, but this information was ignored.

12.2 Apart from any violation of the Covenant found against a State party in a communication, a State party commits grave breaches of its obligations under the Optional Protocol if its inaction serves to prevent or frustrate consideration by the Committee of a communication alleging a violation of the Covenant, or to render examination by the Committee moot and the expression of its Views nugatory and futile. In the present communication, the author alleged that his rights under article 7 of the Covenant would be violated, should he be extradited to Kyrgyzstan. Having been notified of the communication, the State party breached its obligations under the Optional Protocol by extraditing the author before the Committee could conclude its consideration and examination, and the formulation and communication of its Views. It is particularly regrettable for the State to have done so after the Committee acted under rule 92 of its rules of procedure, requesting the State party to refrain from extraditing the author.

12.3 The Committee recalls[15] that interim measures pursuant to rule 92 of the Committee's rules of procedure adopted in conformity with article 39 of the Covenant, are essential to the Committee's role under the Optional Protocol. Flouting of the rule, especially by irreversible measures such as, as in the present case, the author's extradition undermines the protection of Covenant rights through the Optional Protocol. In the Committee's view, those circumstances disclose a manifest breach by the State party of its obligations under article 1 of the Optional Protocol.

Consideration of admissibility

13.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

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[13] See, communication No. 869/1999, *Padilla and Sunga v. the Philippines*, Views adopted on 19 October 2000, para. 5.1.

[14] See communication No. 1910/2009, *Zhuk v. Belarus*, Views adopted on 30 October 2013, para. 6.2, and communications Nos. 1461/2006, 1462/2006, 1476/2006 and 1477/2006, *Maksudov et al v. Kyrgyzstan*, para. 10.1.

[15] See communication No. 964/2001, *Saidova v. Tajikistan*, Views adopted on 8 July 2004, para. 4.4.

13.2 The Committee has ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

13.3 As to the author's claim under article 14, paragraph 3, of the Covenant, the Committee notes that the author does not appear to have brought this issue before the domestic courts. Given the author's failure to do so, the Committee considers that this part of the communication is inadmissible under article 2 and article 5, paragraph 2 (b), of the Optional Protocol.

13.4 The Committee notes the State party's submission that the author's communication should be declared inadmissible because he failed to exhaust all available remedies, since he started making allegations that he had been tortured by the law enforcement bodies of Kyrgyzstan only after he found out that they had requested his extradition. The Committee, however, notes that, according to the State party's own submission (see para. 4.4 above), the author raised his claims in his complaints, dated 29 June 2011 and 27 July 2011, and in the context of the extradition proceeding before the State party's courts. Accordingly, the Committee is not precluded from considering the communication by article 5, paragraph 2 (b), of the Optional Protocol.

13.5 The Committee considers that the author has sufficiently substantiated his claim under article 7 of the Covenant, for purposes of admissibility. Accordingly, it declares this claim admissible and proceeds to its examination on the merits.

Consideration of the merits

14.1 The Human Rights Committee has considered the communications in the light of all the information made available to it by the parties, as provided for under article 5, paragraph 1, of the Optional Protocol.

14.2 As to whether the author's extradition to Kyrgyzstan exposed him to a real risk of torture or ill-treatment, the Committee observes that States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement.[16] This principle should not be subject to any balancing with considerations of the type of criminal conduct an individual is accused or suspected of.[17] The Committee notes that the prohibition of refoulement that derives from article 7 of the Covenant imposes an obligation on the State party to conduct a thorough assessment of the information that was known, or ought to have been known, to the State party's authorities at the time of the extradition and that is relevant for the determination of the risks associated with the extradition. The Committee reiterates that, if a State party removes a person within its jurisdiction to another jurisdiction where there are substantial grounds for believing that extradited person will face a real risk of irreparable harm, such as that contemplated by article 7 of the Covenant, the State party itself may be in violation of the Covenant.[18]

14.3 The Committee notes that the State party conducted an investigation in response to the author's complaints dated 29 June 2011 and 27 July 2011, with the aim of verifying the allegations of torture. The Committee also notes, however, the author's uncontested allegations that the "verification was purely a formality", that author could not participate in the investigation procedure and was never questioned and no forensic examination was conducted.

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[16] Human Rights Committee, general comment No. 20 (1992) on the prohibition of torture or cruel, inhuman or degrading treatment or punishment, *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40* (A/47/40), annex VI, sect. A, para. 9.

[17] See communication No. 2024/2011, *Israil v. Kazakhstan*, para 9.4.

[18] See communication No. 469/1991, *Ng v. Canada*, Views adopted on 5 November 1993, para. 6.2; and Human Rights Committee, general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 40*, vol. I (A/59/40 (Vol. I)), annex III, para. 12.

14.4 The Committee also notes author's submission that, as a result of torture while in detention in Kyrgyzstan, he sustained severe bodily injuries, which resulted in invalidity. The Committee further notes the State party's submission that the author's claims of torture by the Kyrgyz law enforcement officers are unfounded and are motivated by the desire to prevent the extradition. In the Committee's view, the State party has failed to explain why it rejected the author's claims of torture without carrying out medical forensic examination prior to the deportation of author, which could have verified his allegation that his body still bears the scars and signs of torture. The Committee also notes that, after the extradition had taken place, the State party recognized the need and requested the Office of the Prosecutor General of Kyrgyzstan to carry out a medical examination in order to verify the author's allegations of torture.

14.5 The Committee recalls that, at the time of the author's extradition, it was known, or should have been known, to the State party's authorities that there were credible public reports of widespread use of torture against detainees in Kyrgyzstan.[19] It observes that, in assessing the existence of a real risk of irreparable harm in the country requesting the extradition, the competent Kazakh authorities had to take into account all relevant considerations, including the prevailing circumstances in Kyrgyzstan. The Committee notes that the State party procured assurances from the Office of the Prosecutor General of Kyrgyzstan to respect the author's rights. The existence of assurances, their content and the existence and implementation of enforcement mechanisms are all elements which are relevant to the overall determination of whether, in fact, a real risk of proscribed ill-treatment existed. The Committee reiterates, however, that, at the very minimum, the assurances procured should contain a monitoring mechanism and be safeguarded by practical arrangements as would provide for their effective implementation by the sending and the receiving States.[20] The Committee notes the State party's assertion that, to date, representatives of its Embassy were unable to visit the author at the place of his detention in Kyrgyzstan, since they did not receive permission to do so from the Kyrgyz authorities. The State party failed to inform the Committee if it took any action in response to this refusal, in order to implement the "diplomatic assurances" concluded between Kazakhstan and Kyrgyzstan.

14.6 The Committee further notes allegations by the author that, after his extradition, he was subjected to treatment prohibited under article 7 of the Covenant and that, on 11 May 2012, in protest against the repeated use of torture, the lack of investigation of his torture allegations and numerous other violations of his human rights, the author started a hunger strike. Representatives of the State party failed to visit the author in the detention facility, despite the request made by the author to the State party. Such a failure may be attributable to the absence of practical arrangements in the assurances procured or to a lack of sufficient efforts by the State party to ensure the implementation of the assurances. Under those circumstances, the Committee concludes that the procurement of general assurances from the Prosecutor General of Kyrgyzstan cannot be considered an effective mechanism protecting the author from the risk of torture.

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[19] See concluding observations of the Human Rights Committee, the Kyrgyz Republic, CCPR/CO/69/KGZ, 20 July 2000, para. 7; the Report of the Committee against Torture to the General Assembly, A/55/44, para. 74.

[20] See communications Nos. 1461/2006, 1462/2006, 1476/2006 and 1477/2006, *Maksudov et al v. Kyrgyzstan*, para 12.5, and communication No. 1416/2005, *Alzery v. Sweden*, Views adopted on 25 October 2006, para. 11.5.

14.7 Thus, the Committee observes that the decision of the Kazakh authorities to extradite the author to Kyrgyzstan, without conducting a proper investigation of the allegations of torture and ignoring credible reports of a widespread use of torture against detainees there, as well as unjustified refusal to carry out a medical examination prior to his extradition, points at serious irregularities in the decision-making procedures and demonstrates that the State party failed to consider important risk factors associated with an extradition. The Committee further notes that the failure of the State party to subsequently visit the author and monitor conditions of his detention indicates that the procurement of assurances from the Office of the Prosecutor General of Kyrgyzstan should not have been accepted by the State party as an effective safeguard against the risk of violation of the rights of author. Therefore, the Committee concludes that the author's extradition amounted to a violation of article 7 of the Covenant.

15. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation by Kazakhstan of the author's rights under article 7 of the Covenant. The State party also breached its obligations under article 1 of the Optional Protocol to the Covenant.

16. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including adequate compensation. The State party is requested to put in place effective measures for the monitoring of the situation of the author of the communication, in cooperation with the receiving State. The State party should provide the Committee with updated information, on a regular basis, of the author's situation. The State party is also under an obligation to prevent similar violations in the future.

17. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views, and to have them translated in official languages of the State party and widely distributed.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

MM. Communication No. 2136/2012, *M.M.M. et al. v. Australia* (Views adopted on 25 July 2013, 108th session)*

Submitted by:	M.M.M. et al. (represented by counsel, Ben Saul)
Alleged victims:	The authors
State party:	Australia
Date of communication:	20 February 2012 (initial submission)
Subject matter:	Indefinite detention of persons in immigration facilities
Procedural issue:	Exhaustion of domestic remedies; inadmissibility ratione materiae; lack of substantiation
Substantive issues:	Right to liberty; right to protection from inhuman treatment
Articles of the Covenant:	Articles 7, 10 (para. 1) and 9 (paras. 1, 2 and 4)
Article of the Optional Protocol:	Articles 2, 3 and 5 (para. 2 (b))

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 25 July 2013,

Having concluded its consideration of communication No. 2136/2012, submitted to the Human Rights Committee on behalf of M.M.M. et al. under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the authors of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The authors of the communication are nine persons held in Australian immigration facilities. Two of them (Mr. M.M.M., born in 1983, and Mr. R.R., born in 1974) are citizens of Myanmar of Rohingya ethnicity. Six of them (Mr. K.P., born in 1975; Mr. I.M.F., born in 1978; Mr. N.V., born in 1978; Mr. M.S., born in 1974; Ms. M.J., born in 1971; and R.J., born in 2007) are Sri Lankan citizens of Tamil ethnicity. One author (Mr.

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* The following members of the Committee participated in the examination of the present communication: Mr. Yadh Ben Achour, Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Walter Kälin, Ms. Zonke Zanele Majodina, Mr. Kheshoe Parsad Matadeen, Mr. Gerald L. Neuman, Sir Nigel Rodley, Mr. Victor Manuel Rodríguez-Rescia, Mr. Fabián Omar Salvioli, Ms. Anja Seibert-Fohr, Mr. Yuval Shany, Mr. Konstantine Vardzelashvili and Ms. Margo Waterval.

The text of an individual opinion by Committee member Sir Nigel Rodley is appended to the present Views.

A.A.K.B.B.A., born in 1993) is a Kuwaiti citizen of Bedouin ethnicity. They claim violations of their rights under articles 7 and/or 10 (para. 1) and article 9 (paras. 1, 2 and 4). The authors are represented by counsel.

The facts as submitted by the authors

2.1 The authors entered Australian territorial waters by various boats between October 2009 and December 2010, for the purpose of claiming protection as refugees in Australia. They were first disembarked at Christmas Island, which is part of Australian territory. They did not have valid visas to enter Australia and were placed in immigration detention facilities upon their arrival, under section 189 (3) of Migration Act 1958, according to which Australian authorities must detain a person who is an "unlawful non-citizen" in an "excised offshore place". Section 189 governs the detention of those who enter Australia without authorization under migration law. At the time of submission of the communication to the Committee, four of the authors were being held at the Scherger Immigration Detention Centre,[1] four at Villawood Immigration Residential Housing[2] and one at the Melbourne Immigration Transit Accommodation.[3]

2.2 The authors were recognized prima facie by the Department of Immigration and Citizenship (DIAC) as refugees for whom return to their countries of origin was unsafe. However, they were subsequently refused visas to remain in the State party following adverse security assessments made by the Australian Security Intelligence Organisation (ASIO). None of the authors were provided with a statement of reasons by ASIO or DIAC for the adverse security assessments made against them. No relevant evidence substantiating the assessments has been disclosed to them by ASIO or DIAC.

2.3 The authors are unable to challenge the merits of their security assessment.[4] In particular, under section 36 of the Australian Security Intelligence Organisation Act 1979, review by the Administrative Appeals Tribunal is denied to persons who are not citizens or holders of either a valid permanent visa or a special visa. Further, because the authors are offshore entry persons, they are not entitled to seek merits review in the Refugee Review Tribunal. This Tribunal has power only to review a decision to refuse to grant a protection. Further, ASIO issues adverse security assessments after the offshore determination process has been completed. There is therefore no offshore process in which the merits of the adverse security assessments themselves can be reviewed as part of the asylum determination process.

2.4 The only avenue available to the authors is a review before the federal courts for "jurisdictional error" (error of law), which may include the denial of procedural fairness. However, such review is not a merits review of the factual and evidentiary basis of the ASIO decision. Further, in security cases involving ASIO, the federal courts accept that the content of procedural fairness owed to an affected person can be heavily restricted. Since the grounds of the assessments made by ASIO have not been disclosed, the authors have no way of determining whether there exist any jurisdictional errors.

2.5 As they have been refused a visa, all the authors are being kept in detention for the purpose of removal, under section 198 of the Migration Act. However, they do not wish to return voluntarily to their countries of nationality and the State party has not informed them of any intention to remove them to those countries. Nor has the State party informed them that any third country has agreed to accept them, or that active negotiations for such purpose are under way, or of any time frames for any speculative negotiations with other potential countries.

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[1] Authors K.P., I.M.F., N.V. and M.S.

[2] Authors R.R., A.A.K.B.B.A., M.J. and R.J. (the son of M.J.).

[3] Author M.M.M.

[4] The letters received by the authors regarding the outcome of their security assessment indicate that they "do not have a right to seek merits review of the ASIO assessment. This is because under the *Australian Security Intelligence Organisation Act 1979*, only certain categories of persons are able to seek merits review of a security assessment and you do not come within any of those categories".

2.6 The authors claim that no domestic remedies are available to them, as there is no statutory basis for challenging the substantive necessity of detention. Where the authors' conditions of detention are authorized by domestic law, there is no basis under Australian law to challenge inhumane or undignified treatment inflicted by that valid law, in circumstances where the powers conferred by the law are not exceeded.

The complaint

3.1 The authors claim that their detention violates article 9, paragraphs 1, 2 and 4, of the Covenant. It also violates article 7 and/or article 10, paragraph 1.

Article 9, paragraph 1

3.2 The authors' detention is arbitrary or unlawful under article 9, paragraph 1, in two separate phases: first, before the decision by Australia to refuse them refugee protection and second, after the refusal decision and pending their removal from Australia.

3.3 The State party did not provide any lawful, individualized justification for detaining the authors upon their arrival to determine whether each of them presented a risk of absconding or lack of cooperation, or posed a prima facie security threat to Australia. All were automatically detained merely because they were "unlawful non-citizens" in an "excised offshore place". The statutory framework does not permit an individual assessment of the substantive necessity of detention. The authors were never provided with any statement of reasons, nor was relevant information or evidence disclosed to them, to substantiate any suspicion that they posed security risks that warranted detention pending further investigation and the final decision. Moreover, the State party did not provide any procedure for such disclosure to the authors.

3.4 In the absence of any substantiation of the need to individually detain each author, it may be inferred that such detention pursues other objectives: the addressing of a generalized risk of absconding which is not personal to each author; a broader aim of punishing or deterring unlawful arrivals; or the mere bureaucratic convenience of having such persons permanently available. None of these objectives provides a legitimate justification for detention.

3.5 As to the post-refusal stage, the mere assertion by the executive that a person poses a security risk sufficient to justify detention cannot satisfy the requirements of article 9.[5] The

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[5] The letters received from DIAC informing the authors about the security assessment outcome indicate: "ASIO assesses [name of author] to be directly (or indirectly) a risk to security, within the meaning of section 4 of the Australian Security Intelligence Organisation Act 1979. ASIO therefore recommends that any application for a visa by [name of author] be refused". Section 4 of the Act defines "security" as:

(a) the protection of, and of the people of, the Commonwealth and the several States and Territories from:

- (i) espionage;
- (ii) sabotage;
- (iii) politically motivated violence;
- (iv) promotion of communal violence;

secret basis of the security assessment renders it impossible to evaluate the justification for detention. It also constitutes a denial of due process of law. It can only be assumed that the assessments relate to their suspected conduct prior to their entry to Australia. However, if the State party possesses good evidence to suspect that any of the authors has committed a crime in the context of the armed conflict in Sri Lanka, or by association with an organization such as the Liberation Tigers of Tamil Eelam, such crimes can be prosecuted under Australian law. Furthermore, any prior activities of the authors in Sri Lanka cannot easily establish that the authors present a relevant risk to the Australian community. The provenance of information about them may also be unreliable, particularly if the Australian authorities have relied upon intelligence provided by the Government of Sri Lanka.

3.6 The State party has not utilized any alternative means to detention, or demonstrated that such means would be inadequate or inappropriate in meeting security concerns. Furthermore, Australian law does not provide any legally enforceable mechanism for the periodic review of the grounds of detention or a maximum period of detention. Detention simply persists until a person receives a visa or is removed from Australia. In similar cases the High Court of Australia has confirmed the validity of indefinite immigration detention.

3.7 Australia has not provided any evidence or substantiation that the authors are such an "extremely serious threat" as to necessitate their removal from Australia to protect the community, or that less invasive means for protecting the community are unavailable. If Australia intends to expel the authors to a third country, it would also need to demonstrate that such country is safe and that there is no risk of "chain refoulement" to the country of origin.

3.8 The duration of the authors' detention has not been subject to periodic review by the State party of the continuing existence of any personal grounds justifying their detention. There is no legally enforceable mechanism for the periodic review of the grounds of detention and the law does not specify any maximum individual period of detention.

3.9 The security assessment by Australia operates as an additional, unilateral ground for excluding refugees which is not authorized under the Convention relating to the Status of Refugees and exceeds what is permitted by it. Refugees can be excluded from protection only if they are suspected of committing the serious conduct specified under article 1F, or pose risks under article 33, paragraph 2, of the Convention, and not where they fall within the wide meaning of "security" under Australian law. Their detention cannot be justified under international refugee law once their refugee status has been recognized and neither article 1F nor article 33, paragraph 2, applies.

Article 9, paragraph 2

3.10 None of the authors were informed by the authorities of the substantive reasons for their detention. At most, they were made aware that they were detained because they were offshore entry persons and unlawful non-citizens liable to detention under the Migration Act.

(v) attacks on Australia's defence system; or

(vi) acts of foreign interference;

whether directed from, or committed within, Australia or not; and

(aa) the protection of Australia's territorial and border integrity from serious threats and

(b) the carrying out of Australia's responsibilities to any foreign country in relation to a matter mentioned in any of the subparagraphs of paragraph (a) or the matter mentioned in paragraph (aa).

Article 9, paragraph 4

3.11 The detention cannot be challenged under Australian law and no court has jurisdiction to assess its necessity, including by reference to risk factors pertaining to individual authors. The Migration Act requires the mandatory detention of offshore entry persons and does not provide for individualized assessments of the necessity of detaining particular individuals on legitimate grounds. There is thus no statutory basis for challenging the substantive necessity of detention. The only determination processes available to them (refugee status assessment and independent merits review) are limited to a consideration of their asylum claims.

3.12 The Australian courts can only conduct a purely formal review of whether the authors are offshore entry persons, whether they have been granted a visa or not, or whether they are being held pending removal to another country. While the courts can review administrative decisions on limited legal grounds of jurisdictional error, including denial of procedural fairness, such review does not concern the substantive necessity of detention.

3.13 Since the reasons for the adverse security assessments were not disclosed, it is impossible for the authors to identify any errors of law made by ASIO. Furthermore, the courts have accepted that they lack the expertise to evaluate security information and their review of the evidence in such cases remains largely formal and ineffective. Even if the authors could commence judicial review proceedings, ASIO could claim "public interest immunity" to preclude the authors from challenging any adverse security evidence in court, as ASIO has done in other Federal Court cases involving adverse security assessments concerning non-citizens.

Articles 7 and/or 10 (para. 1)

3.14 In combination, the arbitrary character of their detention, its protracted and/or indefinite duration and the difficult conditions in the facilities where they are being held are cumulatively inflicting serious, irreversible psychological harm upon the authors, contrary to articles 7 and/or 10 (para. 1) of the Covenant. The difficult conditions of detention include inadequate physical and mental health services; exposure to unrest and violence and punitive legal treatment; the risk of excessive use of force by the authorities; and witnessing or fearing incidents of suicide or self-harm by others. No domestic remedies, including constitutional remedies, are available in this regard.

3.15 Different institutions, including the Australian Human Rights Commission and medical bodies, have expressed serious concerns in connection with the mental health of persons detained in immigration facilities. In 2010, one of the largest studies, involving over 700 detainees, found a "clear association" between time in detention and rates of mental illness, with especially poor mental health in those detained for more than two years.[6] Another 2010 study found that psychological difficulties persisted even after release and included a sense of insecurity and injustice; difficulties with relationships; profound changes to view of self; depression and demoralization; concentration and memory disturbances; persistent anxiety; and high rates of depression, anxiety, post-traumatic stress disorder and low quality of life.[7]

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[6] See Janet Green and Kathy Eagar, "The health of people in Australian immigration detention centres", *Medical Journal of Australia*, vol. 192, No. 2. See also D. Silove, P. Austin and Z. Steel, "No refuge from terror: the impact of detention on the mental health of trauma-affected refugees seeking asylum in Australia", *Transcultural Psychiatry*, vol. 44, No. 3. These studies are contained on file.

[7] Guy Coffey et al., "The meaning and mental health consequences of long-term immigration detention for people seeking asylum", *Social Science & Medicine*, vol. 70, No. 12, also contained on file.

3.16 The impact of detention on the authors' mental health is exacerbated by the physical conditions of the detention facilities, and evidenced by a large number of incidents of self-harm. For instance, DIAC reported 1,100 incidents of threatened or actual self-harm in 2010–2011.

3.17 The Australian Human Rights Commission has expressed concern, inter alia, at the extremely restrictive environment at Villawood Immigration Detention Centre, with the use of extensive high wire fencing and surveillance. Christmas Island Immigration Detention Centre was similarly described as prison-like. The Commission has also expressed concern about the possibly excessive use of force in detention facilities and about inadequate mental and physical health-care services. The Commission heard complaints about the distressing use of restraints, such as handcuffs, on detainees travelling to medical appointments from Villawood, and about situations in which restraints were not removed when a detainee needed to use the toilet. Health-care centres were found to suffer from insufficient staffing, with impacts on the quality and timeliness of health care. There was a high level of prescription of psychotropic medications at Villawood, including antipsychotics and antidepressants given as sedatives for sleeplessness. Arrangements for preventing or responding to self-harm were also inadequate at Villawood.

3.18 Unrest, protests and violence by detainees are symptoms of the acute frustration and mental distress felt by many detainees. In April 2011, for instance, there were protests by detainees at Villawood, with some detainees occupying the roof of a building for many days.

Remedies sought

3.19 With respect to claims under article 9, the State party should acknowledge the violations of the Covenant, grant the authors immediate release, apologize to them and provide them with adequate compensation, including for the mental distress and psychological suffering. Where the State party believes it is necessary to detain the authors in future, it should provide an individual assessment of the necessity of detaining each author; consider less invasive alternatives to detention as part of such assessment; reasonably inform the authors of the substantive reasons for their detention, beyond a purely formal assertion that they fall within the terms of a particular legal category; provide a procedure for the periodic independent review of the necessity of continuing to detain any author; and provide for the effective judicial review of the necessity of detention.

3.20 Concerning the claims under articles 7 and/or 10 (para. 1), the State party should acknowledge that the circumstances of the authors' detention are inhumane or degrading and apologize to the authors for that, and provide adequate compensation for their inhumane treatment, including for the mental distress and psychological suffering experienced by them.

3.21 In terms of the guarantees of non-repetition, Australian law should be amended to: eliminate mandatory detention; require an individual assessment of the necessity of detention; inform detainees of the substantive reasons for their detention; require periodic independent review of the necessity of detention; require consideration of less invasive alternatives to detention; and provide for substantive and effective judicial review of detention and of adverse security assessments.

State party's observations on admissibility

4.1 On 5 December 2012, the State party contested the admissibility of the communication and argued that all the claims are inadmissible. It stated that on 15 October 2012 the Government had announced that it would appoint an independent reviewer to review adverse security assessments issued in relation to asylum seekers owed protection obligations who are in immigration detention. The reviewer will examine all materials used by ASIO (including any new material referred to ASIO by the affected individual) and report his or her findings to the Attorney General, the Minister for Immigration and Citizenship and the Inspector-General of Intelligence and Security. The reviewer will also conduct a periodic review of adverse security assessments every 12 months. Both the initial and periodic review mechanisms will be made available to the authors of the communication, thus providing them with access to an open and accountable decision-making process in relation to security assessments.

4.2 Given that the authors have been found to be refugees, they are owed protection obligations under international law and cannot be returned to their countries of origin. The Government of Australia is exploring solutions for them, including resettlement in a third country or safe return to their country of origin when the risk of harm no longer exists or when reliable and effective assurances can be received from the home country. However, it is not appropriate for individuals who have an adverse security assessment to live in the Australian community while such solutions are sought.

Non-exhaustion of domestic remedies

4.3 With reference to articles 7, 9 (paras. 1 and 4) and 10 (para. 1), the authors have not exhausted domestic remedies.

4.4 First, the child author R.J. is residing in immigration detention with his mother, M.J., who is the subject of an adverse security assessment. On 21 August 2012, the Minister for Immigration and Citizenship decided to lift the application bar and allow R.J. to lodge an application for a protection visa, and he did so on 1 November 2012. The application is being assessed. If R.J. is granted a visa, he will be a lawful non-citizen and therefore eligible to be released from detention. He could then be placed with relatives or in other community arrangements if his mother wished for him to live in the community. If R.J.'s current application for a protection visa were to be rejected, both a merits review and a judicial review of that decision would be available.

4.5 Secondly, it was open to all authors to seek judicial review of their adverse security assessments and immigration detention in the Federal Court or High Court of Australia and, as part of the proceedings for judicial review, seek information regarding the basis for the security assessment. The authors have not sought such review. A.K.B.B.A. commenced proceedings in the Federal Court of Australia claiming that the Government had a duty to avert the risk of harm by transferring him to a less restrictive form of detention, or even devise a form of detention that allowed him to reside in the community. On 4 June 2012, the Court rejected the claim that such duty existed and found that the author had failed to establish that any of the alternative forms of detention proposed by the author would improve his mental health in a material way. The author filed an appeal to the Full Court of the Federal Court. A decision is still pending.

4.6 In *Al-Kateb v. Godwin* (2004), the High Court held by a narrow majority that the indefinite detention of a failed applicant for a protection visa who could not be deported was authorized by the Migration Act. This finding is currently being challenged before the High Court in the case of *Plaintiff S138/2012 v. Director-General of Security and Ors.* Plaintiff S138 commenced litigation in the High Court in May 2012 challenging his adverse security assessment and the legality of his detention. The High Court will consider a range of issues, including:

(a) Whether the continued detention of Plaintiff S138 is lawful and supported by the Migration Act. As part of this claim, the Court has been asked to consider the lawfulness of detention for the purpose of removal to a safe third country where there is no immediate prospect of such removal;

(b) Whether the detention of the plaintiff is unconstitutional. The plaintiff has argued that it is inherent in the separation of powers in the Constitution that long-term detention of a person is lawful only if ordered by a Court.

4.7 This case is relevant to the communication because, if Plaintiff S138 is successful in the High Court, it could provide an effective remedy to the alleged violations raised by the authors under articles 7, 9 (paras. 1 and 4) and 10 (para. 1). A finding by the High Court in favour of the plaintiff could potentially result in the release from detention of the authors affected by the judgement.

4.8 In a recent case (*Plaintiff M47/2012 v. Director General of Security and Ors*) the High Court considered the reasons for the adverse security assessment which ASIO had provided to Plaintiff M47. The Court held that the refusal to grant Plaintiff M47 a protection visa was not made according to law because a regulation that prevented the granting of a protection visa to a refugee subject to an adverse security assessment was invalid. Therefore, DIAC would need to reconsider the plaintiff's application for a protection visa. The Court found the plaintiff's continuing detention valid for the purpose of determining his application for a protection visa.

4.9 The State party disagrees with the authors' contention that judicial review proceedings are not worth pursuing as Australian courts are limited to conducting a review on the limited grounds of jurisdictional error and are not able to review the substantive merits of the necessity of detention. The State party maintains that it is possible to challenge before the High Court the lawfulness of detention of persons in the authors' circumstances.

Inadmissibility ratione materiae

4.10 With reference to article 9, paragraph 1, the State party disputes the admissibility of any claims relating to the Convention relating to the Status of Refugees in the communication. Such claims are inadmissible *ratione materiae* as incompatible with the provisions of the Covenant.

4.11 Claims under article 9, paragraph 2, are also inadmissible ratione materiae, as the authors were not "arrested". The term "arrest" should be understood as referring to the act of seizing a person, in connection with the commission or alleged commission of a criminal offence, and taking that person into custody. The ordinary meaning of the term arrest does not extend to the placing of an asylum seeker into administrative detention for the purposes of undertaking health, security and identity checks.

Lack of substantiation

4.12 Claims under articles 7 and 10 (para. 1) should be declared inadmissible for lack of substantiation. The authors made general submissions about the conditions of detention. However, they have provided no evidence indicating that the treatment of each or any author in detention has risen to a level of humiliation or debasement beyond the fact of detention itself in their own particular circumstances.

Authors' comments on the State party's observations on admissibility

5.1 On 23 February 2013, the authors provided comments on the State party's observations on admissibility.

5.2 The authors reject the State party's contentions regarding exhaustion of domestic remedies. Formal legal rights to judicial review of both detention and adverse security assessments exist, but the review is practically ineffective and/or too narrow in scope to protect Covenant rights. As regards review of detention, the courts may test whether a detainee is an offshore entry person, but have no power to consider the substantive necessity of detention. Further, the High Court's binding precedent in the *Al-Kateb* case has established that indefinite immigration detention is lawful in domestic law. As regards adverse security assessments, to commence judicial review proceedings an author must first identify a reviewable ground of legal error in the administrative decision. Precisely because the authors are not adequately provided with the reasons or evidence sustaining their adverse security assessments, they are unable to identify legal errors. Commencing speculative proceedings is considered an abuse of court process.

5.3 Regarding the *M47* case mentioned by the State party, the decision of the High Court does not apply to the authors in the present communication, who are unlawful offshore entry persons. The plaintiff in *M47* was a refugee who had lawfully entered Australia and applied for a protection visa. Furthermore, the High Court upheld the lawfulness of his detention pending a new security assessment.

5.4 There are also practical considerations impeding judicial review, namely it is expensive for refugees who are in detention, lack any income and are not entitled to legal aid. In a few rare cases, detained refugees with adverse security assessments have sought judicial review because they were able to identify possible legal errors. There is no minimum degree of disclosure that must always be given to an affected person in ASIO decisions.

5.5 Under the requirement of exhaustion of domestic remedies authors cannot be expected to contest recent and final jurisprudence of the High Court of Australia (namely, the *Al-Kateb* decision). Such a requirement would make it impossible for the author of any communication to exhaust domestic remedies, for a State could simply demand that the author must first contest settled legal precedents of the State's highest court.

5.6 Regarding the proceedings pending in the case of the child author, while the granting of a protection visa would allow him to be released from detention, such granting does not retrospectively cure the unlawfulness of his detention between his arrival in Australia and the granting of the visa, or provide compensation for that period of unlawful detention. As already indicated, there is no legal basis to effectively challenge the lawfulness of his current detention because an indiscriminate policy of mandatory detention applies and cannot be reviewed by the courts other than on the purely formal ground of whether a person entered Australia without a visa. As such, exhausting the administrative remedy invoked by Australia would not provide an effective remedy for the violation of the Covenant.

5.7 Concerning the State party's objection to the admissibility of allegations regarding violations of the Convention relating to the Status of Refugees, the authors argue that they are not requesting the Committee to find direct or autonomous breaches of this Convention. Rather, they request the Committee to interpret article 9, paragraph 1, of the Covenant in accordance with refugee law, which, in this particular communication, should be considered as *lex specialis*.

5.8 As for the State party's objections that article 9, paragraph 2, is confined to situations of criminal arrest, the authors contend that this provision shares in the protective purpose of article 9 to prevent arbitrary arrest or detention, not just criminal arrest or detention. It would make little sense to require a State to give reasons only for arresting suspected criminals but to permit the State free reign to administratively detain a person without explanation or notice.

5.9 The authors have submitted sufficient information for purposes of admissibility regarding claims under articles 7 and 10 and can submit more. Where reports examine certain conditions in detention that apply in the same or comparable way to all detainees, it is open to the Committee to reasonably infer that the objectively established conditions of been considered in all decisions relating to his immigration detention placements and in a manner consistent with the State party's obligations under the Covenant. As indicated above, he has been provided with the option of applying for a protection visa. He has also been provided with appropriate and supportive services and facilities in detention. In particular, he lives in immigration residential housing, which is designed to provide a comfortable environment where children can continue to develop while they reside with their families in detention. He is free to attend outings and other organized activities in order to best permit him to live with as limited restriction and as consistently with his status as a minor unlawful non-citizen as practicable.

6.7 The lawfulness of decisions made under the Australian Security Intelligence Organisation Act is subject to judicial review. In addition, the Inspector-General of Intelligence and Security may inquire into the legality, propriety, effectiveness and appropriateness of ASIO in its work relating to the security assessment of non-citizens.

Article 9, paragraph 2

6.8 If the Committee concludes that the authors were "arrested" for the purposes of article 9, paragraph 2, the State party submits that this provision has not been breached. As is the usual practice, all authors arriving at Christmas Island were provided with a detailed explanation of the reasons for their detention, as set out in a detention notice written in English. The text of the notice was read out by a government official with the assistance of interpreters from the relevant language groups.

Article 9, paragraph 4

6.9 As set out above, the authors have access to judicial review of the legality of their detention, and a court may order their release if the detention does not comply with the law. In *Al-Kateb v. Godwin*, the High Court of Australia held that indefinite administrative immigration detention is within the power of the Parliament when it is for the purposes of assessing claims of non-citizens to remain in Australia and for the purposes of effecting their removal if they have no lawful right to remain, even where their removal is not reasonably foreseeable. The requirement in the Migration Act to remove "unlawful non-citizens" "as soon as reasonably practicable" was held not to imply a time limit on detention.

6.10 The State party rejects the authors' allegation that the law expressly prohibits proceedings being brought in the courts relating to the status of a person as an offshore entry person, or the lawfulness of the detention of an offshore entry person. Although section 494AA of the Migration Act sets a bar on certain legal proceedings relating to offshore entry persons, the section specifically indicates that the provision does not affect the constitutional jurisdiction of the High Court.

6.11 Judicial review of adverse security assessments provides an important opportunity for courts to consider the release of information by ASIO to affected individuals. As part of the judicial review of adverse security assessments, a party to a proceeding may seek access to any information, subject to relevance and to a successful claim for public interest immunity.

Articles 7 and 10 (para. 1)

6.12 Should the Committee believe that the authors have provided enough information to permit a Consideration of the merits of their claims under these provisions, the State party submits that their allegations are without merit. First of all, the system of immigration detention and the treatment of the authors in detention do not give rise to severe physical or mental suffering of the degree required to constitute treatment contrary to these provisions.

Secondly, the system of mandatory immigration detention of unauthorized arrivals is not arbitrary per se and the individual detention of each of the authors is also not arbitrary as it is reasonable, necessary, proportionate, appropriate and justifiable in all of the circumstances. Thirdly, the fact of protracted detention is not in and of itself sufficient to amount to treatment in violation of these articles.

6.13 The State party refutes the allegations that the conditions of detention amount to inhuman or degrading treatment. The authors have been placed in the form of accommodation assessed to be most appropriate to their circumstances. Six authors are in immigration residential housing, two are in immigration transit accommodation and one is in an immigration detention centre. These facilities are all operated by Serco, a private contractor, which is obliged to ensure that people in detention are treated equitably and fairly, with dignity and respect. The actions and behaviour of Serco staff are underpinned by a code of conduct. Serco also has in place policies and procedures which focus on the well-being of people in detention.

6.14 All persons in immigration detention are subject to regular placement reviews in respect of the conditions of detention. Regular reviews have occurred in each of the authors' cases. Immigration detention is also subject to regular scrutiny from external and independent agencies, such as the Australian Human Rights Commission, the Office of the United Nations High Commissioner for Refugees (UNHCR) and the Minister's Council on Asylum Seekers and Detention.

6.15 The State party recognizes that persons in immigration detention, particularly irregular maritime arrivals who have been subjected to torture and trauma or have pre-existing mental health issues, may be vulnerable to mental health deterioration, self-harming behaviour and suicide. Events such as the refusal of a visa application, uncertainty around one's immigration status and time in detention can place additional stress on these persons. For this reason, these persons have access to health care and mental support services appropriate to their individual circumstances, and qualified health professionals conduct regular health assessments.

6.16 All people entering immigration detention have a mental health screening within 72 hours of their arrival in order to identify signs of mental illness and any previous exposure to torture and trauma. Additionally, they are regularly medically assessed, so emerging health concerns and mental health issues can be identified. Irrespective of these periodic assessments, in situations where concerns are raised about a person's mental health, the individual will be referred for a prompt assessment.

6.17 All immigration detention facilities, including those in which the authors reside, have on-site primary health care services of a standard generally comparable to the health care available to the Australian community and take into account the diverse and potentially complex health care needs of persons detained in such facilities. When required specialist medical treatment is not available on site, detainees are referred to off-site specialists.

6.18 In August 2010 the Government implemented three new mental health policies relating to persons in immigration detention facilities: Mental Health Screening for People in Immigration Detention; Identification and Support of People in Immigration Detention who are Survivors of Torture and Trauma; and the Psychological Support Program for the Prevention of Self-Harm in Immigration Detention.

6.19 A number of the authors have received specific treatment and support in relation to their physical and mental health issues. M.M.M., N.V., A.A.K.B.B.A. and I.M.F. have, inter alia, been regularly reviewed by the mental health team and were placed under the psychological support programme when concerns of self-harm were raised. R.R., A.A.K.B.B.A. and K.P. have, inter alia, ongoing counselling with the mental health team and supportive counselling to treat post-traumatic stress disorder. M.J. has ongoing counselling with the mental health team. Ongoing counselling is also provided to R.J. to treat early signs of depressive symptoms.

6.20 Contrary to the assertions made by the authors, the physical conditions of detention are adequate and subject to continual improvement and individuals are given sufficient opportunity to participate in recreational activities. From time to time, incidents involving unrest or violence have occurred, for which Serco has extensive policies in place. The authors have not indicated any incidents of unrest or violence which they have personally witnessed. Restraints are used by Serco only as a last resort and strict limits apply to the level of force that may be deployed.

6.21 The Committee cannot conclude that the authors have been personally subjected to treatment in breach of articles 7 and 10 (para. 1) in the absence of specific allegations regarding each particular author.

Remedies

6.22 Given that the authors' rights under the Covenant have not been violated, none of the remedies sought by them should be recommended by the Committee. It would not be appropriate for the Committee to recommend that the adult authors be released, given the risk that they are judged to be for national security, and in the light of the recent appointment of an independent reviewer. If the Committee concludes that Australia has breached particular rights, the State party requests that remedies other than release be recommended.

Author's comments on the State party's observations on merits

7.1 On 23 February 2013, the authors provided the following comments on the State party's observations on merits.

Article 9, paragraph 1

7.2 The authors contest the State party's argument that their detention is lawful. The legality under this provision must be interpreted not only with respect to domestic law but rather to such law as applies to a given jurisdiction, which comprises both domestic and international law, including the Covenant. Detention on security grounds is unlawful under article 9, paragraph 1, because the domestic procedures for review are manifestly inadequate, as there is: no right to reasons or minimum disclosure of evidence which would enable an affected person to effectively exercise any right to seek review; no independent decision maker of the primary decision, but rather ASIO acting as secret investigator, judge and jury; no binding periodic review by the primary decision maker; no binding merits review; and practically unavailable or ineffective judicial review in which disclosure of even a summary of the security case against a person cannot be compelled.

7.3 The authors maintain that mandatory detention upon arrival is arbitrary. This is particularly so where the duration of detention between their arrival and receipt of their adverse security assessments was so protracted (between 13 months and two years). The State party has not explained the need for this period to be so long.

7.4 The State party makes no attempt to demonstrate that it considered alternatives to detention in each individual case, or explain why particular alternatives are unsuitable given the degree of risk posed by each person. It has provided no evidence regarding its efforts to resettle the authors elsewhere, and specifically, how many countries have been approached to take each of them, how many countries have refused to accept them, or how regularly such requests are made.

7.5 Regarding the unavailability or ineffectiveness of the review of detention, the authors argue that the Inspector-General of Intelligence and Security enjoys only a power of recommendation and cannot provide an effective remedy in the form of a legally enforceable right to have an adverse security assessment overturned.

7.6 As for the detention of the child author, he submits that it is in his best interest both not to reside in detention at all and not to be separated from his mother. It is feasible for Australia to respect his best interests by allowing his mother to reside with him in the community and thus preserving family unity and ordinary family life, as required by articles 17 (para. 1), 23 (para. 1) and 24 of the Covenant, which he invokes here. The author claims that his detention is arbitrary because it is not justified by any necessity and is disproportionate. Australia does not claim that he is a security risk, that he poses a risk of absconding or that he presents any other threat to Australia. Any national security threat posed by his mother (which she does not admit) can be protected by the application of various security measures to her in the community, such as surveillance, reporting, assurances or use of a GPS tracker bracelet.

Article 9, paragraph 2

7.7 The detention notice received by the authors upon arrival does not set out why each author is individually considered to be a risk, thus necessitating detention, whether for reasons of identity, security, health or absconding. Similarly, the DIAC letters informing authors about the ASIO assessment do not identify the security reasons for their detention. The State party has not provided any evidence that each of the authors in fact received the written detention notice on arrival in Australia or that every author at Christmas Island was notified in a language he or she could understand. The State party relies upon the existence of a practice or policy to that effect in general, without proof that such policies were followed in the authors' cases.

Article 9, paragraph 4

7.8 If the authors' detention is found by the Committee to be unlawful under article 9, paragraph 1, for not being necessary or proportionate, article 9, paragraph 4, will also be violated, as the Australian courts lack power to review the necessity of detention. As regards High Court review, the Court decides only about 100 cases per year, as the highest court of appeal and constitutional review in Australia. It is unrealistic to suggest that judicial review is effectively available to the authors when the case load of the High Court is so small, many thousands of offshore entry persons are detained each year and the jurisdiction of other federal courts is excluded. Furthermore, preparing an application to the High Court requires extensive resources and legal representation which are simply not available to them.

7.9 Regarding the judicial review of security assessments, when ASIO believes disclosure of information would prejudice national security, the courts will not overturn those assessments. In various other security cases, the courts have not compelled the disclosure of information assessed by ASIO as prejudicial to security.

Articles 7 and 10 (para. 1)

7.10 A number of Australian independent institutions have repeatedly criticized the inadequacy of the conditions in all immigration detention centres and the impact they have on mental health. For instance, since the registration of the communication, the Commonwealth Ombudsman, who has a statutory mandate to periodically review protracted cases of detention, stated that protracted detention contributes to mental harm and is incompatible with the effective treatment of mental illness. He has also criticized the inadequacy of mental health services in detention. The continuing deterioration of the mental health of detainees is evidence that the health measures taken by Australia are insufficient to ensure the detainees' safety where protracted detention itself is a medically untreatable cause of harm.

7.11 The authors provided a copy of a letter from the Director of the Centre for Developmental Psychiatry and Psychology dated 12 August 2012, in which it is indicated that the treatment provided in the detention centres is limited and will not be able to reverse the detainees' condition. Detention centres are not psychiatric facilities and are not designed or staffed to manage severe mental illness and disturbance. Appropriate care can be provided only in the community mental health system.

7.12 The following facts affect the determination of whether the authors' detention is inhumane or degrading: (a) the authors are refugees entitled to special protection, where detention should be a last resort and for the shortest possible time; (b) most of the authors were traumatized by the experience of fleeing from or immediately after the conflict in northern Sri Lanka in 2009; (c) some of the authors have been diagnosed with mental illnesses and cannot be effectively treated so long as they remain in detention; (d) one of the authors is a child who is especially vulnerable.

7.13 If the Committee is unable to find violations of article 7 because of insufficient evidence, it is still open to the Committee to find a violation of article 10, paragraph 1, because the authors, as a group, have experienced ill-treatment in their circumstances of indefinite detention under adverse physical and health conditions.

Remedies

7.14 The authors disagree with the State party's position in this respect and reiterate their initial requests.

Additional observations of the State party

8.1 On 27 June 2013, the State party submitted that authors M.J. and her son, R.J. had recently been granted protection visas and released from immigration detention into the Australian community. On 21 August 2012, the Minister for Immigration and Citizenship decided to lift the visa application bar and allow R.J. to lodge an application for a protection visa.[8] He was granted a protection visa on 8 February 2013. However, as per his mother's consent, he remained in immigration detention with her. Regarding M.J., a new, non-prejudicial security assessment was recently issued following the conclusion of a further security assessment process which yielded relevant new information. As a result, she was released and now resides in the Australian community with her son.

8.2 As demonstrated in this case, ASIO issues an adverse security assessment only for persons found to be owed protection obligations when it would be inconsistent with the security of Australia for the person to be granted a visa. Any decision to issue an adverse security assessment is based on the information available at the time and new security assessments can and will be issued when new relevant information comes to light.

Issues and proceedings before the Committee

Consideration of admissibility

9.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the case is admissible under the Optional Protocol to the Covenant.

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[8] See para. 4.4 above.

9.2 The Committee has ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

9.3 The Committee notes the State party's challenge to the admissibility of the communication on the ground that domestic remedies have not been exhausted, as the authors did not seek judicial review of the decision regarding their detention and the basis for their security assessment. The State party adds in this respect that the High Court precedent in *Al-Kateb v. Godwin*, stating that indefinite detention of an applicant who could not be deported was authorized by the Migration Act, is currently being challenged before the High Court by an applicant who is in the same situation as the authors in the present communication and that a decision is still pending. However, the Committee considers that the State party has not demonstrated the availability of an effective remedy for the authors' claims regarding their detention. The possibility that the State party's highest court may someday overrule its precedent upholding indefinite detention does not suffice to indicate the present availability of an effective remedy. The State party has not shown that its courts have the authority to make individualized rulings on the justification for each author's detention. Moreover, the Committee notes that in the High Court's decision of 5 October 2012 in the *M47* case, the Court upheld the continuing mandatory detention of the refugee, demonstrating that a successful legal challenge need not lead to release from arbitrary detention. Accordingly, the Committee concludes that the State party has not demonstrated the existence of effective remedies to be exhausted and that the communication is admissible with reference to article 5, paragraph 2 (b), of the Optional Protocol.

9.4. Regarding authors M.J. and R.J., the Committee notes the State party's information dated 27 June 2013 that they had recently been granted protection visas and released from detention (para. 8.1 above). Hence, the Committee's above conclusion applies only in connection with the period of time prior to their release.

9.5 The Committee also notes the State party's argument that the authors' claim under article 9, paragraph 2, should be declared inadmissible *ratione materiae*, as this provision is limited to arrest of persons in connection with the commission of criminal offences. However, the Committee considers that the term "arrest" in the context of this provision means the initiation of a deprivation of liberty regardless of whether it occurs in criminal or administrative proceedings and that individuals have a right to notice of reasons for any arrest.[9] Accordingly, the Committee considers that this claim is not inadmissible *ratione materiae* or on other grounds and should be examined on its merits.

9.6 Regarding the claims under articles 7 and 10 (para. 1) of the Covenant, the Committee considers that they have been sufficiently substantiated for purposes of admissibility and declares them admissible.

9.7 The Committee accordingly decides that the communication is admissible insofar as it appears to raise issues under articles 7, 9 (paras. 1, 2 and 4) and 10 (para. 1).

Consideration of the merits

10.1 The Human Rights Committee has considered the communication in the light of all the information made available to it by the parties, as provided for under article 5, paragraph 1, of the Optional Protocol.

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[9] See general comment No. 8 (1982) on the right to liberty and security of persons (*Official Records of the General Assembly, Thirty-seventh Session, Supplement No. 40* (A/37/40), annex V), paras. 1 and 4; communications No. 1460/2006, *Yklymova v. Turkmenistan*, Views adopted on 20 July 2009, para. 7.2; and No. 414/1990, *Mika Miha v. Equatorial Guinea*, Views adopted on 8 July 1994, para. 6.5.

Claims under article 9, paragraph 1

10.2 The authors claim that their mandatory detention upon arrival and its continuous and indefinite character for security reasons is unlawful and arbitrary, thus constituting a violation of article 9, paragraph 1, of the Covenant. They claim that their detention is disproportionate to the security risk that they are said to pose and that domestic procedures for its review are manifestly inadequate. The State party argues that the adult authors are unlawful non-citizens who are being detained in application of the Migration Act and the Australian Security Intelligence Organisation Act; that their detention is therefore lawful and constitutionally valid, as previously declared by the High Court; and that it is also a proportionate response to the security risk they have been found to pose.

10.3 The Committee recalls that the notion of "arbitrariness" is not to be equated with "against the law", but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law.[10] Detention in the course of proceedings for the control of immigration is not arbitrary per se, but the detention must be justified as reasonable, necessary and proportionate in the light of the circumstances and reassessed as it extends in time. Asylum seekers who unlawfully enter a State party's territory may be detained for a brief initial period in order to document their entry, record their claims, and determine their identity if it is in doubt. To detain them further while their claims are being resolved would be arbitrary absent particular reasons specific to the individual, such as an individualized likelihood of absconding, danger of crimes against others, or risk of acts against national security. The decision must consider relevant factors case-by-case, and not be based on a mandatory rule for a broad category; must take into account less invasive means of achieving the same ends, such as reporting obligations, sureties or other conditions to prevent absconding; and must be subject to periodic re-evaluation and judicial review. The decision must also take into account the needs of children and the mental health condition of those detained. Individuals must not be detained indefinitely on immigration control grounds if the State party is unable to carry out their expulsion.

10.4 The Committee observes that the authors have been kept in immigration detention since 2009 or 2010, first under mandatory detention upon arrival and then as a result of adverse security assessments. Whatever justification there may have been for an initial detention, for instance for purposes of ascertaining identity and other issues, the State party has not, in the Committee's opinion, demonstrated on an individual basis that their continuous indefinite detention is justified. The State party has not demonstrated that other, less intrusive, measures could not have achieved the same end of compliance with the State party's need to respond to the security risk that the adult authors are said to represent. Furthermore, the authors are kept in detention in circumstances where they are not informed of the specific risk attributed to each of them and of the efforts undertaken by the Australian authorities to find solutions which would allow them to obtain their liberty. They are also deprived of legal safeguards allowing them to challenge their indefinite detention. For all these reasons, the Committee concludes that the detention of authors M.M.M., R.R., K.P., I.M.F., N.V., M.S. and A.A.K.B.B.A. is arbitrary and contrary to article 9, paragraph 1, of the Covenant. This conclusion extends to authors M.J. and her minor son R.J., in connection with the period of time prior to their release.

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[10] See communications No. 1134/2002, *Gorji-Dinka v. Cameroon*, Views adopted on 17 March 2005, para. 5.1; and No. 305/1988, *van Alphen v. Netherlands*, Views adopted on 23 July 1990, para. 5.8.

Claims under article 9, paragraph 2

10.5 The authors claim that, individually considered, they were not informed by the authorities of the substantive reasons for their detention, neither upon arrival nor after the assessment made by ASIO. The State party argues that, upon arrival, all authors were provided with a detention notice explaining that they were suspected of being unlawful non-citizens and that, later on, each of them were informed of the ASIO security assessment by letter. The Committee first observes that article 9, paragraph 2, requires that anyone who is arrested be informed, at the time of arrest, of the reasons for the arrest, and that this requirement is not limited to arrest in connection with criminal charges.[11] The Committee considers that, as far as their initial detention is concerned, the information provided to the authors is sufficient to meet the requirements of article 9, paragraph 2. Moreover, the adverse security assessment they later received represents a subsequent phase in their migration processing and did not amount to a new arrest implicating article 9, paragraph 2, but rather must be considered in relation to article 9, paragraph 1. The Committee therefore concludes that there has been no violation of article 9, paragraph 2, of the Covenant.

Claims under article 9, paragraph 4

10.6 Regarding the authors' claim that their detention cannot be challenged under Australian law and that no court has jurisdiction to assess the substantive necessity of their detention, the Committee notes the State party's argument that the authors can seek judicial review before the High Court of the legality of their detention and the adverse security assessment. In view of the High Court's 2004 precedent in *Al-Kateb v. Godwin* declaring the lawfulness of indefinite immigration detention, and the absence of relevant precedents in the State party's response showing the effectiveness of an application before the High Court in similar more recent situations, the Committee is not convinced that it is open to the Court to review the justification of the authors' detention in substantive terms. Furthermore, the Committee notes that in the High Court's decision of 5 October 2012 in the M47 case, the Court upheld the continuing mandatory detention of the refugee, demonstrating that a successful legal challenge need not lead to release from arbitrary detention. The Committee recalls its jurisprudence that judicial review of the lawfulness of detention under article 9, paragraph 4, is not limited to mere compliance of the detention with domestic law, but must include the possibility to order release if the detention is incompatible with the requirements of the Covenant, in particular those of article 9, paragraph 1.[12] Accordingly, the Committee considers that the facts in the present case involve a violation of article 9, paragraph 4.

Claims under articles 7 and 10 (para. 1)

10.7 The Committee takes note of the authors' claims under articles 7 and 10 (para. 1), and the information submitted by the State party in this regard, including on the health care and mental support services provided to persons in immigration detention. The Committee considers, however, that these services do not take away the force of the uncontested allegations regarding the negative impact that prolonged indefinite detention, on grounds that the person cannot even be apprised of, can have on the mental health of detainees. These allegations are confirmed by medical reports concerning some of the authors. The Committee considers that the combination of the arbitrary character of the authors' detention, its protracted and/or indefinite duration, the refusal to provide information and procedural rights to the authors and the difficult conditions of detention are cumulatively inflicting serious psychological harm upon them, and constitute treatment contrary to article 7 of the Covenant. In the light of this finding the Committee will not examine the same claims under article 10, paragraph 1, of the Covenant.

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[11] See footnote 9 above.

[12] Communications No. 1014/2001, *Baban v. Australia*, Views adopted on 6 August 2003, para. 7.2; No. 1069/2002, *Bakhtiyari v. Australia*, Views adopted on 29 October 2003, para. 9.4; Nos. 1255 et al., *Shams et al. v. Australia*, Views adopted on 20 July 2007, para. 7.3.

11. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the State party has violated the authors' rights under articles 7 and 9 (paras. 1 and 4) of the Covenant.

12. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide all authors with an effective remedy, including release under individually appropriate conditions for those authors still in detention, rehabilitation and appropriate compensation The State party is also under an obligation to take steps to prevent similar violations in the future. In this connection, the State party should review its migration legislation to ensure its conformity with the requirements of articles 7 and 9 (paras. 1 and 4) of the Covenant.

13. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when it has been determined that a violation has occurred, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views, and to have them widely disseminated in the State party.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Appendix

Individual opinion by Committee member Sir Nigel Rodley

I refer to my separate opinion in *C. v. Australia.*[a] I consider the finding of a violation of article 9, paragraph 4, circular and superfluous, since the lack of legal safeguards to challenge the detention is part of and arguably central to the above finding of a violation of article 9, paragraph 1. I also remain unconvinced that the protection of article 9, paragraph 4, requiring the ability to challenge the lawfulness of a detention extends far beyond, if at all, a challenge to lawfulness under national law. Unlawfulness under international law is precisely the province of article 9, paragraph 1.

[Done in English. Subsequently to be issued also in Arabic, Chinese, French, Russian and Spanish, as part of the present report.]

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[a] See communication No. 900/1999; *C. v. Australia*, Views adopted on 28 October 2002, individual opinion of Committee member Sir Nigel Rodley.

NN. Communication No. 2149/2012, *M.I. v. Sweden* (Views adopted on 25 July 2013, 108th session)*

Submitted by:	M. I. (represented by counsel, Eva Rimsten of Swedish Red Cross)
Alleged victim:	The author
State party:	Sweden
Date of communication:	7 May 2012 (initial submission)
Subject matter:	Deportation of a lesbian to Bangladesh
Procedural issue:	Insufficient substantiation
Substantive issues:	Risk of torture and other cruel, inhuman or degrading treatment or punishment upon return to country of origin; prohibition of refoulement
Articles of the Covenant:	7
Article of the Optional Protocol:	2

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 25 July 2013,

Having concluded its consideration of communication No. 2149/2012, submitted to the Human Rights Committee by M. I., under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The author of the communication is M. I., a Bangladesh national, born on 1 January 1985. She claims that her deportation to Bangladesh by the State party would violate article 7 of the Covenant. The author is represented by counsel.

1.2 On 10 May 2012 and 18 January 2013, the Special Rapporteur on new communications and interim measures, acting on behalf of the Committee, decided not to issue a request for interim measures under rule 92 of the Committee's rules of procedure in light of insufficient information as to the facts submitted by the author at the time.

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* The following members of the Committee participated in the examination of the present communication: Mr. Yadh Ben Achour, Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Walter Kälin, Ms. Zonke Zanele Majodina, Mr. Kheshoe Parsad Matadeen, Mr. Gerald L. Neuman, Sir Nigel Rodley, Mr. Victor Manuel Rodríguez-Rescia, Mr. Fabián Omar Salvioli, Ms. Anja Seibert-Fohr, Mr. Yuval Shany, Mr. Konstantine Vardzelashvili and Ms. Margo Waterval.

The facts as submitted by the author

2.1 The author used to live in Dhaka, Bangladesh, where her parents and siblings still live. She alleges that she is lesbian and that her parents learned about this around the end of 2002 or the beginning of 2003. Subsequently, her parents arranged a marriage for her with a Bengali man living in Sweden. The marriage took place on 3 January 2006 in Dhaka against her will. Her husband stayed for a few days in Bangladesh before returning to Sweden.

2.2 In June 2006, the author arrived in Sweden, after receiving a temporary Swedish residence permit. When her husband found out that she was a lesbian, he forced her to return to Bangladesh in July 2006. That same year, she met her partner and they started living together. Due to their low income, they sought aid from a student organization, called Satra Dal (Chhatra Dal). In exchange, the author helped the organization to recruit new members. In April 2008, the police learned that she was lesbian, and arrested and detained her for four to five days. During her detention, she was raped and beaten. During the same period, on 14 April 2008, her partner, Ms. P.A., was kidnapped by the Islamic student organization, called Shator Shivir (Chhatra Shibir), and the author does not know her whereabouts since then. The author alleges that she received threats from this organization and from the police. She was in touch with a sister and, occasionally, with her mother; her father refused to have any contact with her, as he felt that his honour had been harmed because of her behaviour.

2.3 As her Swedish residence permit was valid until May 2008, the author returned to Sweden. On 16 May 2008, she applied for asylum before the Swedish Migration Board. She stated that she had fled Bangladesh to escape abuse by the police and Chhatra Shibir. She claimed that she had been detained by the police for four or five days and raped due to her sexual orientation, and that her partner had been kidnapped by Chhatra Shibir. Moreover, homosexual acts are forbidden under Bangladeshi law[1] and no organization can openly defend the rights of homosexuals. If returned to Bangladesh, she would be at risk of torture and inhuman treatment. She provided a medical report, dated 11 December 2008, which stated that she was depressed and under medication. She felt isolated, helpless and unsafe, and was scared all the time.

2.4 On 14 January 2009, the Migration Board rejected the author's application for asylum and ordered her return to Bangladesh. The Board pointed out that she did not provide any written proof to support her claims, and concluded that her allegations were not credible. The Board did not believe that she would be at risk of persecution due to her sexual orientation. It stated that the threats allegedly made by her parents, her husband's family or persons from Chhatra Shibir were criminal acts by individuals, and should be dealt with by the Bangladeshi authorities. Likewise, the author's detention and rape by the police was an act of misconduct that should have been reported to the authorities. The acts she complains about were never reported to the police or any other relevant authority and she did not show that the authorities were incapable or unwilling to investigate these allegations or to protect her. The Board further noted that although homosexual acts are forbidden by Bangladeshi law, it is not clear whether the law is actually enforced.[2] Finally, the Board pointed out that the author had left Bangladesh without any difficulties using her own passport, which showed that she was not wanted by the Bangladeshi authorities.

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[1] Section 377 of the Criminal Code of Bangladesh states that "any person who voluntarily has sexual intercourse against the order of nature with a man, woman or animal, shall be punished with imprisonment of up to 10 years or for life."

[2] The Committee notes that the Migration Board's decision refers to the Swedish Ministry of Foreign Affairs' report on human rights in Bangladesh, 2007, and to the United Kingdom: Home Office, *Country of Origin Information Report – Bangladesh*, 31 August 2007.

Moreover, it noted that she had arrived in the State party for the first time in 2006, but applied for asylum only in 2008. Therefore, it concluded that she did not feel an urgent need for protection.

2.5 The author appealed this decision before the Swedish Migration Court. She asserted that the Migration Board's decision focused its assessment on information that the Bangladesh law prohibiting homosexual acts was not applied. However, the Board failed to assess all the elements related to her case, in particular her forced marriage and departure to Sweden, as a way of making her change her sexual orientation, and the abuses to which she and her partner were subjected in Bangladesh. As a victim of rape by the police, she could not have gone to the police for help. Moreover, the Migration Board ignored how homosexuals are generally treated in Bangladeshi society. She had provided two medical reports, dated 28 May and 19 October 2009, which stated that she suffered from severe depression due to her fear of returning to Bangladesh and her family's rejection of her sexual orientation. Despite medication, her situation had worsened and there was a high risk of suicide.

2.6 On 22 December 2009, the Migration Court dismissed the author's appeal. It stated that the author did not provide any documentation in support of her claim and that the general situation for homosexuals in Bangladesh was not sufficient grounds for it to grant the author a residence permit in the State party. Furthermore, there were inconsistencies in her allegations and the information she provided was vague and not credible. The inconsistencies relate in particular to the manner in which her husband had learned about her sexual orientation, and when and in what circumstances she was made to leave her parents' house. The information she provided about her allegations regarding persecution by Chhatra Shibir was vague and insufficient. With regard to the alleged disappearance of her partner, the Court upheld that the author's assertion that neighbours had seen her partner being taken away by men with beards was not enough to conclude that she had been kidnapped by Chhatra Shibir. Furthermore, since the author had failed to file a complaint about that event, it could not be concluded that she would be at risk due to her partner's disappearance. Regarding her allegations of arrest, physical abuse and rape by the police, the Court reiterated the Migration Board's position that this aggression was a criminal act committed by individual policemen and there was no reason to believe that they would not have been investigated and sanctioned by the authorities. The Migration Court concluded that the author had failed to show that she would risk persecution if returned to Bangladesh.

2.7 The author submitted an application for leave to appeal before the Migration Court of Appeal. On 5 May 2010, the Court decided not to grant her leave to appeal.

2.8 After the migration authorities' decision to return the author to Bangladesh, her psychological state worsened. She was hospitalized six times due to deep depression and risk of suicide. On 24 February 2011, she submitted an application to the Migration Board under chapter 12, sections 18 and 19, of the Aliens Act, requesting non-execution of the expulsion order for medical reasons. She argued that during the previous interviews with the Board she had felt shame, given in particular the presence of men. There were also misunderstandings during the interviews due to interpretation. On 9 March 2011, the Migration Board dismissed her application. The Board considered that the author's state of health had already been assessed by both the Migration Board and the Migration Court. Moreover, the provision laid down in chapter 12, section 18, of the Aliens Act is applicable to situations in which the person is so severely ill that return is, in principle, impossible.

2.9 In October 2011, the author submitted a second application to the Migration Board, putting forward new circumstances to support her allegations regarding risk of persecution or torture and other cruel, inhuman or degrading treatment or punishment if returned to Bangladesh. She submitted as evidence a copy of an application to the Cerani Gong police station in Dhaka about the disappearance of her partner, filed by her partner's brother. She also submitted an article published in the newspaper *Dainik Nowroj* on 13 April 2011, which deals with lesbianism in Bangladesh. This article makes reference to a 2008 article which commented on the author's relationship with Ms. P.A. The 2011 article indicated that the previous article had received much attention throughout the country and that, as a result, the author and her partner had gone into hiding and no one knew where they were. The 2011 article also included the opinion of a sociology professor from the University of Dhaka, declaring that relationships like that of the author and her partner were signs of the negative effect that Western culture had on Bangladeshi society. The author also submitted a new medical report which reflects her statements that, due to her sexual orientation, she was mentally and physically abused by her husband, the police had arrested, beaten and raped her, and her family did not want to have contact with her. According to the medical report, she lived in great fear and was in need of medication and counselling as she was severely traumatized and suffered from severe depression without psychotic symptoms.[3] Finally, the author submitted reports about the human rights situation in Bangladesh and the risk of persecution faced by lesbian, gay, bisexual and transgender persons (LGBTs).[4] On 15 February 2012, the Migration Board rejected the application.

2.10 The author appealed the Migration Board's decision to the Migration Court. On 9 March 2012, the Court concluded that there were no new circumstances to render a re-examination of the case necessary. The author then lodged an application for leave to appeal before the Migration Court of Appeal. On 23 March 2012, the Court of Appeal denied the leave.

2.11 On 10 and 15 January 2013, the author informed the Committee that lesbians are stigmatized in Bangladesh and often face extreme family and social pressure to marry a man. Chhatra Shibir is an extremist Islamic organization whose goal is to establish an Islamic system in Bangladesh. The fact that there is little information about persecution of sexual minorities by Chhatra Shibir is an indication of how difficult the situation in Bangladesh is for homosexuals.[5]

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[3] A copy of the medical report, dated 14 October 2011, is in the Committee's file.

[4] The author refers to reports by the Office of the United Nations High Commissioner for Refugees (UNHCR) and International Crisis Group, as well as the report, *Fleeing homophobia: Asylum claims related to sexual orientation and gender identity in Europe*, by Sabine Jansen and Thomas Spijkerboer, COC Nederland and University of Amsterdam, September 2011.

[5] The author submitted to the Committee reports from States and NGOs about the situation in Bangladesh, including United States Department of State, *2010 Human Rights Report : Bangladesh* (April 2011); United Kingdom: Home Office, *Bangladesh – Country of Origin Information Report* (23 December 2011); Human Rights Watch, *World Report 2011: Bangladesh, Events of 2010* (January 2011); Immigration and Refugee Board of Canada, *Bangladesh: Treatment of homosexuals, including legislation, availability of state protection and support services* (19 July 2010); and Citizens' Initiatives on CEDAW-Bangladesh, *Combined sixth and seventh UN CEDAW alternative report* (July 2010). According to the report of the U.S. Department of State, in practice the law that criminalizes homosexual acts is rarely enforced. In general, there is no information concerning persecution of homosexuals and homosexual rights organizations remain informal and are unable to set up permanent establishments due to the possibility of police raids. In addition, the author's references to these reports highlight the fact that homosexual acts are criminalized in Bangladesh under section 377 of its Criminal Code. Some reports refer to the situation of lesbians in Bangladesh and note that the fate of virtually all Islamic women is marriage and motherhood. Lesbians are objects of rejection and social derision, and lesbianism is kept secret for fear of loss of marriage prospects. On the other hand, Citizens' Initiatives states that new research shows that sexually marginalized populations, especially those belonging to the *hijra* or transgender/trans-sexual community, are systematically persecuted by State agents through section 54 of the Penal Code, which allows for arrest without warrant in case of "suspicious" behaviour. It further states that the police are notorious for gross infringements of the rights of sexual minorities through invoking section 54, and that

2.12 The author stated that she was living illegally in Sweden and that the decision to expel her to Bangladesh could be executed by the police at any time. Moreover, the Migration Board informed her that she had no right to a daily allowance or housing. Without this aid, she had no financial means nor a place to stay in the State party. She also informed the Committee that the Migration Board had refused to re-register her as an allowance beneficiary. She feared being placed in administrative detention while awaiting expulsion.

The complaint

3.1 The author holds that the authorities of the State party did not adequately assess the risk she would be subjected to if returned to Bangladesh, notably persecution or torture and other cruel, inhuman or degrading treatment or punishment, which would violate article 7 of the International Covenant on Civil and Political Rights. The authorities of the State party focused excessively on the fact that the law prohibiting homosexual acts is not applied. However, they failed to assess all the elements related to her case, including her mental health condition.

3.2 Although the law that criminalizes homosexual relationships is not systematically applied it reinforces a general climate of homophobia and impunity for those who persecute LGBT individuals. Moreover, the law is applied in an unofficial manner without recorded prosecutions by State and non-State agents.

3.3 The author claims that the migration authorities did not take into account that during the proceedings she needed language interpretation and that the inconsistencies in her statements regarding important facts were due to misunderstandings or inaccurate interpretation.

State party's observations on admissibility and merits

4.1 On 14 January 2013, the State party provided observations on the admissibility and merits of the communication. It pointed out that the author's case had been assessed by its authorities under the 2005 Aliens Act, which entered into force on 31 March 2006, and that all domestic remedies had been exhausted.

4.2 The decision ordering the expulsion of the author to Bangladesh gained legal force on 2 June 2010, when the Migration Court of Appeal decided not to grant her leave to appeal. Since she refused to leave the State party voluntarily, on 4 November 2010, the Migration Board decided to hand over the enforcement of the expulsion order to the police.

4.3 The communication is manifestly unfounded as the author's assertions that she is at risk of being treated in a manner that would amount to a breach of the Covenant fail to attain the basic level of substantiation required for the purpose of admissibility.

4.4 Should the Committee conclude that the communication is admissible, the issue before the Committee is whether a forced return of the author to Bangladesh violates the obligation of the State party under article 7 of the Covenant.

4.5 Since Bangladesh is a State party to the International Covenant on Civil and Political Rights as well as to the Convention against Torture and Other Cruel or Inhuman or Degrading Treatment or Punishment, it is assumed that the Committee is well aware of the general situation of human rights in the country, including for LGBT individuals. Based on

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harassment, physical and sexual abuse and extortion, as well as arbitrary arrest and detention, are standard forms of violence faced by these groups.

a number of reports[6] on the current situation in Bangladesh, it cannot be concluded that there is a general need to protect asylum seekers from that country. Although there may be concerns with respect to the current human rights situation in Bangladesh as regards LGBT individuals, this does not in itself suffice to establish that the forced return of the author would constitute a breach of the State party's obligation under article 7 of the Covenant.

4.6 The Swedish migration authorities apply the same kind of test when considering an application for asylum under the Aliens Act as the Committee applies when examining a communication under article 7 of the Covenant. The national authority assessing the asylum request is in a very good position to evaluate information submitted by an asylum seeker as well as to evaluate the credibility of his or her claims.

4.7 With regard to the author's claim that she faces a real personal risk of being subjected to torture or other cruel, inhuman or degrading treatment or punishment in Bangladesh by Bangladeshi authorities as well as by the Islamic student organization, Chhatra Shibir (Islami Chhatra Shibir), due to her sexual orientation, the State party recalls that the Migration Board and migration courts made a thorough examination of the author's claim. Before deciding the case, the Migration Board conducted a short introductory interview in connection with the asylum application as well as a longer interview with the author which lasted approximately one hour and forty minutes and was conducted in the presence of her appointed counsel and an interpreter, whom the author confirmed that she understood well. Furthermore, the author had the opportunity to submit observations on the minutes of the interview and has also argued her case in writing before the Migration Board and migration courts. The Migration Court also held a hearing in which the author was heard. Moreover, even after the decision ordering her expulsion had gained legal force, the Migration Board had, on two occasions, reviewed new circumstances invoked by her under chapter 12 of the Aliens Act. The expulsion decision was appealed, but was not overturned by the migration courts. Against this background, it must be considered that the Migration Board and migration courts had a solid basis for assessing the author's need for protection in the State party. There is no reason to conclude that the decisions of the migration authorities were inadequate or that the outcome of the domestic proceedings was clearly arbitrary or amounted to a denial of justice. In fact, great weight should be attached to the assessment made by the State party's migration authorities.

4.8 As concerns the author's allegations of persecution, the State party contends that her account contains a number of discrepancies and ambiguities with regard to the events following her return to Bangladesh in July 2006, many of which had already been pointed out in the Migration Court's decision of 22 December 2009. At the first interview with the Migration Board on 19 May 2008, the author submitted that her family in Bangladesh had put her out from their home in 2002-2003, when they learned that she was homosexual. At the interview with the Migration Board on 8 December 2008, however, she stated on several occasions, that her family put her out of the home in 2006, assumedly not long after her return to Bangladesh from the State party. Moreover, she stated that she had met her partner at the university in 2006 and that they considered themselves a couple when she was thrown out of her family home in 2006. Furthermore, her counsel submitted a written statement to the Migration Court, dated 1 April 2009, in which the author claims that she was forced to move out of her parents' home upon her return to Bangladesh, because her father allegedly became furious, and threatened and beat her. At the Migration Court's oral hearing on 9 December 2009, the author stated that she had been locked up in her parents' home for seven to eight months after her return to Bangladesh in 2006 and beaten several times, until she finally managed to escape to her partner's home, in February or March 2007. The State party highlights that the author was assisted by a legal counsel as well as an interpreter throughout the major part of the asylum proceedings, and that prior to the hearings, she had the opportunity to argue her case in writing before both the Migration Board and the Migration Court.

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[6] The State party refers to Swedish Ministry for Foreign Affairs, *2010 Report on Human Rights in Bangladesh* (June 2011); United Kingdom: Home Office, *Bangladesh – Country of Origin Information Report* (30 September 2012); and United States Department of State, *2011 Country Reports on Human Rights Practices – Bangladesh* (24 May 2012).

4.9 Throughout the proceedings, the author provided vague and sketchy information regarding the alleged threats from the Islamic student organization, Chhatra Shibir, as well as the circumstances surrounding the kidnapping of her partner. The author submitted that she was threatened orally by Chhatra Shibir on four occasions, and that she believed that members of the organization had kidnapped her partner while the author herself was in police custody. However, she did not provide any details as to when she had received the threats, how they were expressed nor their specific content. Furthermore, her allegations regarding the circumstances surrounding the kidnapping of her partner were likewise vague, relying only on second-hand information from fellow students who allegedly had seen her partner being removed by "men wearing beards". The State party further notes that the author's alleged escape from Bangladesh corresponds in time with the date on which her temporary residence permit in the State party expired. Consequently, in light of the discrepancies and ambiguities regarding the essential aspects of the author's account, there are strong reasons to question the author's credibility regarding the events that allegedly occurred after she returned to Bangladesh in July 2006 and up to May 2008.

4.10 The State party considers that the author does not run a real risk of being subjected to treatment in violation of article 7 of the Covenant if returned to Bangladesh. She has not submitted any written documentation to support her claim that she was or still is being sought or accused of any crime by the Bangladeshi authorities. Moreover, she was able to leave Bangladesh in May 2008 from the international airport, using her own passport, without any problems. Furthermore, according to her own account, she was released from the alleged arrest by the Bangladeshi police after only a couple of days, despite the fact that homosexuality is criminalized in Bangladesh. In view thereof, there is nothing to suggest that the arrest and treatment of the author was officially sanctioned by the Bangladeshi authorities; rather, they must be seen as criminal acts performed by individual police officers. In this regard, the State party points out that there is no information in human rights reports concerning the author's country of origin indicating that Bangladeshi authorities systematically or actively seek out or persecute lesbians.

4.11 As regards the alleged threats from Chhatra Shibir, the author has not submitted any concrete information indicating that members of the organization would search for her at the present time. Besides, more than four years have passed since the author allegedly received threats from this organization. In view of this, any personal threat that the author anticipates from the organization cannot be considered to be based on grounds that go beyond theory or suspicion. Likewise, there is no concrete information suggesting that the family of her former husband would subject her to treatment in breach of article 7 of the Covenant. Between July 2006 and May 2008, the author lived in Dhaka and no action was taken against her by her former husband's family.

4.12 With regard to the written evidence submitted by the author to the Migration Board with her second request for re-examination of her application for a residence permit on 20 October 2011, the so-called enquiry application submitted to the Bangladeshi police by the brother of the author's partner was a faxed copy of a handwritten document, and therefore it is considered as having low value as evidence. Furthermore, the State party informs the Committee that it requested assistance from its embassy in Dhaka regarding the article submitted by the author that allegedly appeared in the newspaper *Dainik Nowroj* in order to verify the existence of the newspaper and for information about, inter alia, its distribution and readership. The Swedish Embassy in Dhaka said that it had no knowledge of the newspaper and that, in any event, it was not one of the major newspapers in the country. Furthermore, the embassy failed to find any further information about the newspaper in question. The State party contends that, regardless of the foregoing, it is peculiar that an article would be published by the newspaper in April 2011, describing how the author's relationship caught media attention three years earlier, in January 2008. Even if that was the case, it is even more peculiar that the author was not aware of the allegedly countrywide attention created by the first article in 2008. Therefore, the State party considers that the submitted news article has very low value as evidence.

4.13 In conclusion, the State party submits that the author's account lacks credibility and contains a number of discrepancies and grey areas regarding essential parts. Hence, the communication should be declared inadmissible under article 3 of the Optional Protocol for lack of substantiation. Accordingly, enforcement of the expulsion order against the author would not constitute a violation of article 7 of the Covenant. Concerning the merits, the State party contends that the communication reveals no violation of the Covenant.

Author's comments on the State party's observations

5.1 On 4 March 2013, the author provided her comments on the State party's observations on admissibility and merits. The author reiterates that several sources of information have described how difficult and grave the situation is for LGBT individuals in Bangladesh. Furthermore, the Bangladeshi authorities are neither willing nor able to protect LGBT individuals because homosexual acts are illegal under domestic law (section 377 of the Criminal Code).

5.2 She claims that the examination of her case by the Swedish migration authorities, under the 2005 Aliens Act, is not comparable to an examination in respect of article 7 of the Covenant. Although she submitted new evidence, her case was never re-examined by the State party's authorities under the criteria set up by chapter 12, section 19, of the Aliens Act. In practice, the Aliens Act makes it almost impossible for an asylum seeker to have his or her request re-examined. In her case, the Migration Board considered in its decision of 15 February 2012 that the new evidence presented was of low value. This means that not all the evidence presented was thoroughly examined in a manner that can be compared to an examination under article 7 of the International Covenant on Civil and Political Rights.

5.3 According to the UNHCR Handbook on procedures and criteria for determining refugee status (HCR/IP/4/Eng/REV.1), the interviewer needs to take into consideration that a vague or general description can be due to "fear" on the part of the applicant. Moreover, the interviewer should also consider that the applicant may be suffering from trauma and cannot remember all the details and circumstances of the case. As regards her account of events to the migration authorities, it is clear from the record of her first interview with the migration authorities on 19 May 2008 that there was a misunderstanding between her and the interviewer. When she referred to events with her family in 2002 or 2003, she meant that that was when her family learned that she was lesbian and they thought that it would be difficult to find a husband for her in Bangladesh, so they arranged a marriage with a man who was living abroad. However, the interviewer understood that that was when she was put out of her parents' house. Furthermore, her legal counsel was not present at the first interview, which was very short, and the interviewer only posed a few follow-up questions; the record of the interview was not read out to her after the interview.

5.4 As to the State party's observation that she altered her accounts at the Migration Court hearing, the author argues that her telling the Migration Court that she was held captive in her parent's home has no substantial ground since she also mentioned to the Migration Board that she was held captive by her family. However, due to a misunderstanding by the interpreter at the interview, this statement was not put in the same way as at the hearing in the Migration Court. In her first interview with the Migration Board, she mentioned that she was not in good health and, during the second interview, she stated that she suffered from psychological problems and that she had seen a doctor. She also told the interviewer that she had been raped by the Bangladeshi police while in custody. Medical reports dated 11 December 2008, which she had presented to the Migration Board before it took its first decision, established that she was getting more depressed in spite of medical treatment. Subsequently, a psychiatrist's report dated 10 October 2009 stated that she suffered from adaptation disorder and deep depression, without psychotic symptoms. The author recalls that victims of torture often suffer from flashbacks and unreliable memory which, as explained in the medical reports she submitted, is the reason for the discrepancies and gaps in the information that she provided. Notwithstanding this, the essential part of her account has been the same all along; therefore there is no reason to question her credibility.

5.5 The organization, Chhatra Shibir was founded in 1977 and has become one of three major student organizations in Bangladesh. She was first contacted by the organization by phone when she was still at her family's home. When she refused to answer his questions, the caller threatened her and told her that if she did not follow the religion, he would take action. Later, when she moved in with her partner, they were both followed by member of Chhatra Shibir, and its leader, Mr. J, threatened to throw acid in their faces, tell everybody in the neighbourhood about their sexual orientation and stone them to death. They did not report this to the police for fear of being arrested for being lesbians. On another occasion she told Chhatra Shibir that she would go to the police. However, shortly after this she was arrested by the police and sexually abused while in custody. The police told her that she was arrested because she was a lesbian. As regards her partner's disappearance, she submits that she was not present when her partner was taken away and that is why she could only rely on second-hand information. Nonetheless, a neighbour told her that her partner was taken away by bearded men carrying swords.

5.6 The State party's inquiry about the newspaper *Dainik Nowroj* and its request for assistance to its embassy in Dhaka was not communicated to the author; therefore, it is difficult for her to respond to the embassy's reply that no such newspaper exists. However, a simple Internet search confirms that the newspaper exists and is on the list of media in Bangladesh.[7] On the other hand, she states that it is not peculiar that she did not know about the publication of an article about her and her partner in this newspaper in 2008 because she did not read the newspapers in those days. That was the year in which she left Bangladesh to return to Sweden and, prior to her departure, her partner had disappeared and she had been arrested by the police so she was not living a normal life because she was under much pressure, traumatized and very afraid. It was her mother who informed her about the article and accused her of putting even more shame on her family by being featured in the publication. Subsequently, one of her friends dared to send a copy of the article to her.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the case is admissible under the Optional Protocol to the Covenant.

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[7] The Committee notes that the website address referred by the author (http://media-bangladesh.com/media-details.php?mid=63) lists the names of people related to some media in Bangladesh; it shows the address, phone and fax numbers for the newspaper *Daink Nowroj*, as well as the names of staff members.

6.2 As required under article 5, paragraph 2 (a), of the Optional Protocol, the Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement.

6.3 With regard to the requirement laid down in article 5, paragraph 2 (b), of the Optional Protocol, the Committee takes note of the State party's acknowledgement that all available domestic remedies have been exhausted. The Committee also takes note of the State party's argument that the author's claim under article 7 is unsubstantiated. However, the Committee considers that, for the purpose of admissibility, the author has provided sufficient details and documentary evidence regarding her claims under article 7 of the Covenant. Therefore, as no other obstacles to admissibility exist, the Committee declares the communication admissible and proceeds to its examination on the merits.

Consideration of the merits

7.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as required under article 5, paragraph 1, of the Optional Protocol.

7.2 The Committee notes the author's claim that her return to Bangladesh would expose her to a risk of torture and other cruel, inhuman or degrading treatment or punishment, due to her sexual orientation. Prior to her last arrival in the State party, her family had forced her to marry a Bangladeshi man; she had been harassed by the organization, Chhatra Shibir, and the Bangladeshi police; while in police custody she was raped by policemen; her partner was kidnapped by members of Chhatra Shibir and her whereabouts are still unknown. Bangladeshi law forbids homosexual acts and LGBT individuals lack protection from the authorities, who are neither willing nor able to protect them. Although this law is not systematically applied, its existence reinforces a general climate of homophobia and impunity for State and non-State agents who persecute LGBT individuals. Furthermore, homosexuality is harshly stigmatized in Bangladeshi society and lesbians are often subjected to intimidation and ill-treatment and forced by their families to marry men. As a result of all the events she experienced, the author's mental health has been severely affected. The author also claims that she provided relevant evidence that was not given due weight by the State party's authorities, in particular a copy of an article published in the newspaper *Dainik Nowroj* on 13 April 2011 that made reference to her sexual relationship with her partner, Ms P.A., which had previously been described in a newspaper article in 2008 that had received much attention throughout the country.

7.3 The Committee takes note of the State party's arguments that the author lacks credibility, as her statements regarding persecution by the police and Chhatra Shibir were vague and she had not provided any written documentation to support her claims in the asylum proceedings. Furthermore, the State party considers the alleged arrest and rape of the author to be the result of misconduct on the part of policemen, and that her claim that she had been threatened by Chhatra Shibir, which is responsible for her partner's kidnapping, lacked concrete evidence. The State party also argues that, notwithstanding the Bangladesh law criminalizing homosexual acts and concerns about the human rights situation regarding LGBT individuals, the law is not applied in practice. In addition, the documentation submitted by the author with her second application to the Migration Board is considered of low value as the authorities cannot verify its authenticity.

7.4 The Committee recalls its general comment No. 31[8] in which it refers to the obligation of States parties not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant. The Committee also recalls that, generally speaking, it is for the organs of States parties to the Covenant to review or evaluate facts and evidence in order to determine the existence of such risk.

7.5 In the present communication, the Committee observes, based on the material before it, that the author's sexual orientation and her allegations of rape by Bangladeshi policemen while in detention was not challenged by the State party. It also observes that her sexual orientation was in the public domain and was well known to the authorities; that she suffers from severe depression with high risk of committing suicide despite medical treatment received in the State party; that section 377 of the Criminal Code of Bangladesh forbids homosexual acts; and that homosexuals are stigmatized in Bangladesh society. The Committee considers that the existence of such a law in itself fosters the stigmatization of LGTB individuals and constitutes an obstacle to the investigation and sanction of acts of persecution against these persons. The Committee considers that in deciding her asylum request the State party's authorities focused mainly on inconsistencies and ambiguities in the author's account of specific supporting facts. However, the inconsistencies and ambiguities mentioned are not of a nature as to undermine the reality of the feared risks. Against the background of the situation faced by persons belonging to sexual minorities, as reflected in reports provided by the parties, the Committee is of the view that, in the particular case of the author, the State party failed to take into due consideration the author's allegations regarding the events she experienced in Bangladesh because of her sexual orientation — in particular her mistreatment by the police — in assessing the alleged risk she would face if returned to her country of origin. Accordingly, in such circumstances, the Committee considers that the author's deportation to Bangladesh would constitute a violation of article 7 of the Covenant.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is therefore of the view that deportation to Bangladesh would, if implemented, violate the author's rights under article 7 of the Covenant.

9. In accordance with article 2, paragraph 3(a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including full reconsideration of her claim regarding the risk of treatment contrary to article 7 if she is returned to Bangladesh, taking into account the State party's obligations under the Covenant and the Committee's present Views. In the meantime, the State party is requested to refrain from expelling the author to Bangladesh while her request for asylum is under reconsideration. The State party is also under the obligation to take steps to prevent similar violations in the future.

10. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to its

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[8] See the Committee's general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, para. 12, *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 40*, vol. I (A/59/40 (Vol. I)), annex III.

Views. The State party is also requested to publish the present Views, and to have them translated in the official language of the State party and widely distributed.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

OO. Communication No. 2155/2012, *Paksas v. Lithuania* (Views adopted on 25 March 2014, 110th session)[*]

Submitted by:	Rolandas Paksas (represented by counsel, Stanislovas Tomas)
Alleged victim:	The author
State party:	Lithuania
Date of communication:	24 June 2011 (initial submission)
Subject matter:	Restrictions to the right to participate in public life
Procedural issue:	Inadmissibility *ratione materiae*
Substantive issues:	Right to participate in public life and vote in free and fair elections
Articles of the Covenant:	Article 14, paragraphs 1 and 2; article 15; article 25 (a), (b), (c)
Article of the Optional Protocol:	Article 3; article 5, paragraph 2 (b)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 25 March 2014,

Having concluded its consideration of communication No. 2155/2012, submitted to the Human Rights Committee by Mr. Rolandas Paksas under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Rolandas Paksas. He claims that Lithuania[1] has violated his rights under articles 14 (paras. 1 and 2), 15, and 25 (a), (b) and (c) of the International Covenant on Civil and Political Rights. Mr. Paksas is represented by Stanislovas Tomas.

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[*] The following members of the Committee participated in the examination of the present communication: Mr. Yadh Ben Achour, Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Walter Kälin, Ms. Zonke Zanele Majodina, Mr. Gerald L. Neuman, Sir Nigel Rodley, Mr. Victor Manuel Rodríguez-Rescia, Mr. Fabián Omar Salvioli, Ms. Anja Seibert-Fohr, Mr. Yuval Shany, Mr. Konstantine Vardzelashvili, Ms. Margo Waterval and Mr. Andrei Paul Zlătescu.

The text of an individual opinion by Committee member Mr. Neuman is appended to the present Views.

[1] The Optional Protocol entered into force for the State party on 20 February 1992, without reservation.

The facts as submitted by the author

2.1 The author was elected President of the Republic of Lithuania on 5 January 2003 in direct and democratic elections. On 11 April 2003, the author issued Decree No. 40, countersigned by the Minister of the Interior, granting Lithuanian citizenship by way of exception for service to Lithuania, to a Russian businessman, Jurij Borisov – who had been awarded the Medal of Darius and Girėnas for service to Lithuania for his efforts to glorify the name of Lithuania in the world and for assisting Lithuania in its integration into the world community of States, by the author's predecessor, Valdas Adamkus, via Presidential Decree No. 1373(2001).

2.2 On 6 November 2003, the Lithuanian Parliament (Seimas) requested the Constitutional Court to advise whether Presidential Decree No. 40 was in compliance with the Constitution and with the Citizenship Act. The Seimas submitted that the procedure of granting citizenship on an exceptional basis appeared to have been applied inappropriately, considering that Mr. Borisov had no special merit warranting exceptional treatment for him, and that the author had granted him citizenship as a reward for his substantial financial assistance to his election campaign.

2.3 The author submits that on 8 December 2003, the main impeachment initiator, Gintaras Steponavicius, Vice-President of the Seimas, met with Egidijus Kūris, President of the Constitutional Court, and that they discussed the granting of citizenship to Mr. Borisov. On 18 December 2003, 86 members of the Seimas submitted a proposal to initiate impeachment proceedings against the author. On 23 December 2003, the Seimas set up a special commission to investigate the allegations about the author's conduct. On 19 February 2004, the special investigation commission concluded that some of the charges made against the author were founded and serious, and it recommended that the Seimas institute impeachment proceedings. On the same day, the Seimas requested the Constitutional Court to determine whether the specific acts of the author cited by the commission had breached the Constitution.

2.4 On 31 March 2004, the Constitutional Court adopted Ruling No. 14/04 declaring a gross breach of the Constitution and of the author's constitutional oath on three points:

(a) Unlawfully granting citizenship to Mr. Borisov by Decree No. 40 as a reward for his financial support;

(b) Informing Mr. Borisov that the law enforcement institutions were investigating him and tapping his telephone conversations; and

(c) Exploiting his official status to influence decisions of the private company Žemaitijos keliai Ltd. concerning the transfer of shares, with a view to defending the property interests of certain private individuals close to him.

2.5 On 6 April 2004, the Seimas voted in favour of the impeachment. The author wished to stand as a candidate in the presidential election called for 13 June 2004. On 22 April 2004, the Central Electoral Committee found that there was no legal ground to prevent him from standing. However, on 4 May 2004, Parliament amended the Presidential Elections Act by inserting the following provision: "A person who has been removed from parliamentary or other office by the Seimas in impeachment proceedings may not be elected President of the Republic if fewer than five years have elapsed since his removal from office." Following this amendment, the Central Electoral Committee refused to register the author as a candidate. The issue was forwarded to the Constitutional Court.

2.6 On 25 May 2004, the Constitutional Court held (in Ruling No. 24/04) that disqualifying a person from standing for election was compatible with the Constitution, but that subjecting such a disqualification to a time limit was unconstitutional. The Court further pointed that the spirit of the Constitution prohibits the author from standing for presidential or parliamentary elections and from being a prime minister, minister, judge or state controller, for life. On 15 September 2008, Parliament amended the Law on Local Self-Government. The author considers that this amendment prohibits him, as an impeached president, from standing for local election.

2.7 On 21 October 2004, the Prosecutor General discontinued the criminal investigation into allegations that the author had abused his office as President in order to influence decisions made by the Žemaitijos keliai company concerning the transfer of its shares in violation of article 228 of the Criminal Code.

2.8 On 13 December 2005, the Lithuanian Supreme Court acquitted the author of the charge of informing Mr. Borisov that the law enforcement institutions were investigating him and tapping his telephone conversations.

2.9 On 27 September 2004, the author lodged an application against Lithuania with the European Court of Human Rights. In its judgement of 6 January 2011,[2] the European Court held that Lithuania had violated article 3 of Protocol No. 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, and considered that the author's disqualification from holding parliamentary office was disproportionate because of its permanent and irreversible nature. The remainder of the author's complaint was declared incompatible *ratione materiae* with the Convention. Following the European Court's judgement, the Government formed a working group to make proposals for carrying it out. On 31 May 2011, the working group submitted its conclusions, stating that it was necessary to remove the irreversible and permanent nature of the disqualification for persons removed from office following impeachment proceedings for committing a gross violation of the Constitution and breaching the constitutional oath. The proposed constitutional amendments were approved by the Government on 6 June 2011, but the Constitutional Court held them to be unconstitutional on 5 September 2012.

The complaint

3.1 The author claims a violation of articles 14 (paras. 1 and 2), 15 and 25 (a), (b) and (c) of the International Covenant on Civil and Political Rights.

3.2 The author considers that his complaint must be held admissible because: (a) he submitted it on 24 June 2011 and therefore did not delay in addressing the Committee after Judgement 34932/04 of the European Court of Human Rights, issued on 6 January 2011; and (b) the right to stand for presidential elections is not covered *ratione materiae* by the European Convention for the Protection of Human Rights and Fundamental Freedoms, and was therefore not examined by the European Court.[3]

3.3 With regard to the exhaustion of domestic remedies, the author refers to the amendment of the Law on Local Self-Government adopted on 15 September 2008 introducing a prohibition on an impeached president standing for local elections. According to the author, domestic litigation on this point would relate to general legislation and would not serve his purpose.

3.4 The author refers to Ruling No. 24/04, in which the Constitutional Court gave its interpretation that it shall be prohibited to organize a referendum to determine whether the author violated the Constitution and whether the lifelong prohibition on standing for election must be revoked, which he claims was in violation of article 25 (a) of the Covenant. The author states that this breach was mentioned in his application to the European Court of Human Rights, but was not examined.

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[2] See European Court of Human Rights Judgement 34932/04, *Paksas v. Lithuania*, 6 January 2011.

[3] Ibid., para. 72.

3.5 On the merits, the author considers that the lifelong prohibition on standing for presidential and local elections was not established by law, is not objective, is not reasonable, and is disproportionate, therefore violating his rights under article 25 (a) and (b) of the Covenant. In this respect, the author makes reference to the Committee's jurisprudence in *Dissanayake v. Sri Lanka*, where the Committee recognized that a seven-year prohibition on standing in elections following a breach of the Constitution was disproportionate.[4]

3.6 The author argues that there was no fair trial, and that the requirement of procedural fairness as set out in article 25 (c) was violated, including through the meeting held on 8 December 2003 between the Vice-President of the Seimas and the President of the Constitutional Court, where they discussed the granting of citizenship to Mr. Borisov. On 16 March 2004, the author's lawyers submitted a motion for the removal of Justice Kūris on account of this meeting, but it was denied. The author therefore considers that the right to objective impartiality as developed in the jurisprudence of the Committee[5] was breached by the Constitutional Court.

3.7 The author also argues that the Constitutional Court was biased in two respects. Firstly, on 5 January 2004, the Constitutional Court made a comment on the author's New Year speech. Secondly, on 16 March 2004, the President of the Constitutional Court commented during the hearings that the motion for removal of the judges made by the author could be dismissed without consideration.[6]

3.8 The author considers that the Seimas exercised continuous pressure on the courts. For example, on 25 March 2004, it issued a "Declaration on the actions of President Rolandas Paksas", stating that the finding of the author's guilt by the Constitutional Court was "just a matter of time" and that "having regard to the fact that the impeachment proceedings would last for quite a long period, [the Seimas] proposes to Rolandas Paksas, President of the Republic, to resign". According to the author, the Seimas was sure of the outcome of the ongoing impeachment proceedings, thereby breaching article 14, paragraph 2, of the Covenant.

3.9 The author argues that Constitutional Court Ruling No. 24/04 states that the lifelong prohibition on his standing for election and being appointed to offices requiring a constitutional oath is based on a presumption of guilt that is contrary to article 14, paragraph 2, of the Covenant, and was applied to him retrospectively in breach of article 15 of the Covenant.

3.10 The author states that the lifelong prohibition on holding the office of Prime Minister or Minister was introduced, for the first time, with Ruling No. 24/04 of the Constitutional Court on 25 May 2004 which was implemented after the acts of the author but before the end of the impeachment proceedings. The Seimas amended the Parliamentary Elections Act and the Presidential Elections Act accordingly.

3.11 The author considers that the principle of objectivity was violated because of the breach of basic procedural fairness, and because of the discrimination he suffered as compared to political opponents. The author reiterates the arguments developed with regard to the alleged violation of article 14 of the Covenant, arguing that neither of the two previous presidents were subjected to lifelong restrictions, despite granting citizenship on an exceptional basis, "for merits", in "much more controversial" cases. Referring to the Committee's jurisprudence,[7] the author considers that the sanction imposed on him is disproportionate and violates article 25 of the Covenant.

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[4] See communication No. 1373/2005, *Dissanayake v. Sri Lanka*, Views adopted on 22 July 2008, para. 8.5.

[5] See communication No. 1015/2001, *Perterer v. Austria*, Views adopted on 20 July 2004, para. 10.4.

[6] "The motion for removal might be denied together (with the request for leave to present video evidence), but such a question must be decided in the Deliberation Room. However until now you have not presented the reasons for removal."

3.12 In a further submission dated 9 June 2012, the author argues that the Committee should examine the prohibition on the organizing of a referendum on the question of whether the author had violated the Constitution following Constitutional Court Ruling No. 24/04, and on the question of whether the lifelong prohibition on standing for election must be revoked. The author also considers that, while the issue of the right to a fair trial was held inadmissible by the European Court of Human Rights, it should be considered admissible by the Committee in compliance with its jurisprudence.[8]

3.13 In this regard, the author considers that the impeachment proceedings were of a criminal nature, as they were initiated following alleged criminal offences. The author also observes that according to article 246 of the Seimas Rules of Procedure, which were in force from February 1999 to November 2004, the impeachment proceedings had to comply with the "principles and fundamental rules of criminal proceedings". The author further considers that the impeachment proceedings before the Constitutional Court are a suit at law, since a group of members of the Parliament officially made an accusation against him before the Constitutional Court, and since the recognition of the breach unavoidably led to his removal from office. The author therefore argues that articles 14 and 15 are applicable.

3.14 The author argues that the Constitutional Court usurped the will of the people, removing their right to vote for the author and thereby threatening democracy. The author further observes that the Constitution does not include any *expressis verbis* ban on being re–elected after an impeachment.

3.15 The author considers that the Constitutional Court's ruling of 5 September 2012 amounts to a refusal to execute the judgement of the European Court, which required the re-establishment of the author's right to stand in parliamentary elections and violates article 25 of the Covenant.

3.16 The author therefore seeks recognition of violations of articles 14 (paras. 1 and 2), 15 and 25 of the Covenant, and the re-establishment of his right to stand for presidential, parliamentary and local elections and to hold offices that require a constitutional oath.

State party's observations on admissibility and on the merits

4.1 In its notes verbales dated 21 September 2012 and 5 December 2012, the State party submitted its observations. The State party considers that the communication must be declared inadmissible and without merit insofar as the author's allegations are incompatible with the provisions of the Covenant and are unsubstantiated.

4.2 The State party considers that the impeachment proceedings are a form of constitutional liability and cannot be equated to disciplinary proceedings against civil servants or to criminal charges.[9] The purpose of the impeachment case instituted against the author was to determine whether he had committed gross violations of the Constitution and whether his constitutional oath had been breached. The State party considers that the impeachment proceedings did not concern the determination of the author's rights and obligations in a suit at law; instead, they involve the head of State's constitutional liability and therefore lie outside the criminal sphere.

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[7] The author refers to communication No. 1373/2005, *Dissanayake v. Sri Lanka*, op. cit.; communication No. 1134/2002, *Fongum Gorji-Dinka v. Cameroon*, Views adopted on 17 March 2005; and communication No. 1392/2005, *Lukyanchik v. Belarus*, Views adopted on 21 October 2009, para. 8.5.

[8] The author refers to communication No. 1774/2008, *Boyer v. Canada*, decision on inadmissibility adopted on 27 March 2009, para. 4.2; communication No. 1015/2001, *Perterer v. Austria*, op. cit., para. 9.2; and communication No. 1454/2006, *Lederbauer v. Austria*, Views adopted on 13 July 2007, para. 7.2.

[9] See communication No. 1015/2001, *Perterer v. Austria*, op. cit., para. 9.2.

4.3 The State party also considers that the author is incorrect in arguing that the gross violations of the Constitution for which he was removed from office should have been proved in a criminal court. This interpretation perverts the provisions of the Constitution on impeachment, as not all the grounds of the impeachment are related to the commission of a criminal act. According to the Constitution, criminal prosecution cannot be instituted against the President of the Republic as long as he is in office (article 86 of the Constitution).

4.4 The State party argues that even after the Constitutional Court concluded that the author had breached his oath and had violated the Constitution, he still had the possibility of resigning from office in order to avoid full constitutional liability. The specific restriction at issue is applicable only in cases where the Seimas removes a person from office by not less than a three-fifths majority vote following a relevant conclusion of the Constitutional Court. The State party argues that the author did not avail himself of the said opportunity to resign from office. It considers that a final decision by Parliament is the grounds for applying a constitutional sanction, and that article 14 of the Covenant is not applicable to proceedings before Parliament.

4.5 The State party further considers that the acquittal of the author on 13 December 2005 for disclosure of classified information cannot change the conclusion of the Constitutional Court that the author grossly violated the Constitution.[10] The impeachment procedure does not involve the determination of any criminal charge or of rights and obligations in a suit at law within the meaning of article 14 of the Covenant. This part of the communication should therefore be declared inadmissible *ratione materiae* under article 3 of the Optional Protocol.[11]

4.6 Should the Committee consider otherwise, the State party argues that the author's allegations concerning alleged violations of article 14, paragraphs 1 and 2, of the Covenant are unsubstantiated. In that regard, the State party considers that the author's communication seeks the re-examination of the legality of the constitutional sanction imposed on him, and refers to the jurisprudence of the Committee, under which: "it is in principle for the courts of States parties to evaluate the facts and evidence, unless the evaluation of the facts and evidence was manifestly arbitrary or amounted to a denial of justice"[12]. The State party considers that this is clearly not the case in regard to the complaints made by the author. The State party recalls that Lithuanian law provides for a number of safeguards to protect persons implicated in impeachment proceedings from arbitrary treatment, as the rules of criminal procedure and fair trial principles apply to impeachment proceedings. While the decision to initiate such proceedings and to apply a sanction are the prerogative of the Seimas, a political body, it is the task of a judicial body, the Constitutional Court, to rule on whether there has been a violation of the Constitution. If the Court finds no such violation, the Seimas cannot remove the official from office. Furthermore, when conducting impeachment proceedings, the Seimas is presided over by a judge of the Supreme Court, and it cannot remove a person from office other than by a three-fifths majority of its members in a reasoned decision. Lastly, the author was assisted by numerous counsels, and was able to provide his evidence during public hearings.[13]

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[10] Constitutional Court's conclusion of 31 March 2004.

[11] Communication No. 1419/2005, *De Lorenzo v. Italy*, decision on inadmissibility adopted on 24 July 2007.

[12] Communications No. 1329/2004 and No. 1330/2004, *Pérez Munuera and Hernández Mateo v. Spain*, decision on inadmissibility adopted on 25 July 2005.

4.7 The State party considers that the author has not submitted any reasoned arguments on the alleged arbitrariness and unfairness of the proceedings. Regarding the alleged bias of the Constitutional Court in its public statement of 5 January 2004 issued in reaction to the author's speech of 31 December 2003, the State party considers that the Court clearly refrained from engaging in any political polemics.

4.8 As regards the alleged bias resulting from the meeting between the President of the Constitutional Court and the Vice-President of the Seimas, the State party considers that these allegations are unsubstantiated, as the impeachment proceedings had not been initiated at that time. The State party considers that the Committee's jurisprudence in *Dissanayake v. Sri Lanka*[14] cannot be applied to the author's case because the restrictions referred to were not linked to the author's arbitrary conviction and sentence. Additionally, the State party considers that the gravity of the author's unconstitutional conduct cannot be compared to that of Mr. Dissanayake, who was convicted for contempt of court. The State party considers that the present case also differs from the Committee's case of *Bandaranayake v. Sri Lanka*,[15] since the restriction imposed on the author's rights was the result of his removal under the constitutional impeachment proceedings (and not following criminal liability), without any kind of arbitrariness.

4.9 As regards the author's complaint under article 14, paragraph 2, of the Covenant, for alleged violation of the presumption of innocence, the State party considers that the author is perverting Lithuanian law by equating the impeachment proceedings with criminal or disciplinary law issues.

4.10 The State party further considers that when blaming the Seimas for breaching the presumption of his innocence, the author did not mention that the declaration that suggested his resignation from presidential office was made following his invitation to Mr. Borisov to become his public adviser on 24 March 2004, and following the declaration that the author made on television the next day to apologize for that invitation, which he qualified as a "fatal mistake". The State party considers that the declaration of the Seimas responded to the vulnerability of the President, as reflected in the conviction of Mr. Borisov for the use of psychological abuse against him. The State party therefore considers that the author's allegations concerning violation of article 14 of the Covenant are unsubstantiated.

4.11 As to the alleged violation of article 15 of the Covenant for the alleged arbitrary and retrospective application of a constitutional sanction, the State party refers to the Committee's jurisprudence under which article 15, paragraph 1, prohibits the retroactive application of laws only in relation to criminal law matters.[16] The measures of removal from office and (consequent) disqualification from standing for election involve the Head of State's constitutional liability and lie outside the "criminal" sphere.

4.12 Should the Committee consider otherwise, the State party maintains that the author's allegations concerning violations of article 15 of the Covenant are unsubstantiated and without merit. The constitutional sanction was not applied retrospectively, as it entered into force on the day on which the author was removed from office by the Seimas, and procedural safeguards were respected. Furthermore, the State party argues that the restriction adopted was not unforeseeable: in its ruling of 25 May 2004, the Constitutional Court further developed the concept of the irreversible nature of a constitutional sanction resulting from impeachment, already known since the ruling of the Constitutional Court of 11 May 1999. If the author had doubts as to the consequences of the constitutional liability, he could have requested the interpretation and revision of this ruling to the Constitutional Court under articles 60 and 61 of the Law on the Constitutional Court.

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[13] See judgement of the Grand Chamber, 6 January 2011, Application No. 34932/04, § 102.

[14] Op. cit.

[15] Communication No. 1376/2005, *Bandaranayake v. Sri Lanka*, Views adopted on 24 July 2008.

[16] Communication No. 1994/2010, *I.S. v. Belarus*, decision on inadmissibility adopted on 25 March 2011.

4.13 New amendments to the Law on Seimas Elections and to the Law on Presidential Elections were adopted in May and July 2004 respectively, with the aim of specifying the constitutional provisions and lessening the sanctions applicable following impeachment proceedings. The Constitutional Court declared those provisions unconstitutional. The State party considers that this decision was not unforeseeable for the author, and concludes that the alleged violation of article 15 of the Covenant should be held to be unsubstantiated and without merit.

4.14 As regards the alleged violation of article 25 of the Covenant, the State party considers that the scope and content of the constitutional sanction is clearly, precisely and narrowly defined, as the prohibition exclusively relates to passive presidential and parliamentary election rights, and positions requiring a constitutional oath. The right to vote and to participate in the conduct of public affairs is not restricted, as demonstrated by the author's political activities after his removal from presidential office.

4.15 As to the alleged violation of the author's right to initiate a referendum, the State party argues that the impeachment procedure is clearly regulated. The removal of a person or the revocation of his/her mandate and the imposition of subsequent constitutional sanctions cannot be decided by way of referendum. The State party considers that the complaint by the author on this matter is incompatible *ratione materiae* with the provisions of the Covenant: the author could have initiated a referendum for amendment of the respective constitutional provisions under article 9§3 of the Constitution. The State party therefore considers that the author's complaint under article 25 (b) of the Covenant is inadmissible and without merit.

4.16 The State party further argues that the author has never been prevented from standing for municipal elections. He was listed as the first candidate of his political party for the Municipality of Vilnius City at the municipal elections of February 2007, and he was a member of Vilnius City Council from March 2007 to June 2009. The State party also argues that the amendments introduced in 2008, to article 22 of the Law on Local Self-Government, do not affect the author's rights insofar as the oath introduced for new members of the Self-Government Council is different from the constitutional oath. The author's claim under article 25 of the Covenant concerning his inability to stand for municipal elections is therefore without merit.

4.17 As regards the author's inability to stand for parliamentary elections, the State party considers that the author does not refer to any particular elections where he would have been prevented from exercising his right to do so. The State party considers that, in compliance with the jurisprudence of the Committee,[17] the author cannot claim to be a victim within the meaning of article 1 of the Optional Protocol.

4.18 Should the Committee consider otherwise, the State party argues that the author failed to exhaust domestic remedies with regard to his inability to stand for parliamentary elections. If the author had expressed his intention to become a member of the Seimas in

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[17] Communication No. 1038/2001, *Dáithí Ó Colchúin v. Ireland*, decision on inadmissibility adopted on 28 March 2003.

October 2004 and October 2008 and the Supreme Electoral Commission had refused to register him as a candidate, he could have applied to the administrative courts for alleged interference with his right to do so. The Committee is therefore precluded from considering this part of the communication pursuant to article 5, paragraph 2 (b), of the Optional Protocol. The State party argues that this position is supported by the recent reforms adopted by the Government following the judgement of the European Court of Human Rights.

4.19 The State party further considers that the newness of the democratic regime in Lithuania justifies the maintaining of the existing constitutional sanction, even though it might appear excessive in a well-established democracy. Only eight years have elapsed since the author's removal from presidential office. The restriction on standing for election can still be regarded as reasonable and proportional to the constitutional offences that he committed. Constitutional amendments were proposed and approved by the Government on 6 June 2011 and transmitted to the Seimas. It was decided to make relevant changes to the Law on Seimas Elections, and relevant constitutional amendments will be introduced in the very near future.

4.20 In respect of the alleged violation of article 25 (b) of the Covenant regarding the restriction on standing for the presidential elections, the State party refers to the jurisprudence of the Committee under which the exercise of the right to vote and to be elected may not be suspended or excluded except on objective and reasonable grounds that are established by law[18] and are compatible with the purpose of the law.[19] The State party reiterates that no criminal liability was applied to the author, and that only his passive right to stand for the presidential elections was restricted. Although of an irreversible nature, the constitutional restrictions are proportionate to the aim pursued and to the gravity of the related breaches. The State party concludes that the author has failed sufficiently to substantiate his claim under article 25 (b), which should therefore be held inadmissible under article 2 of the Optional Protocol.

4.21 As to the reasonableness of the constitutional restriction on standing in presidential elections, the State party reiterates that its aim is to prevent any person who has grossly violated the Constitution and breached his/her constitutional oath from holding the office provided for in the Constitution. The constitutional restriction relates to the same office from which the author was removed. Given that the aim of the impeachment procedure is to protect and strengthen the democratic constitutional order and national security, the restriction must be considered as reasonable. Similar restrictions of a permanent nature exist in the legislation of other democratic States (such as the United States of America, the Czech Republic, Slovakia and Poland).

4.22 The State party further emphasizes that the constitutional restriction on standing in presidential elections only applies to categories of persons that are clearly defined in law, and there is no doubt that, as former President of the Republic, the author belongs to that group. The constitutional restriction could therefore not be described as discriminatory. The State party further recalls that since the restoration of the independence of Lithuania, seven similar procedures have been initiated in respect of other serving presidents. The restriction at issue is precisely worded; it applies in the same way to anyone and it is objective.[20]

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[18] General comment No. 25 (1996) on the right to participate in public affairs, voting rights and the right of equal access to public service, para. 4.; and communication No. 1134/2002, *Fongum Gorji-Dinka v. Cameroon*, op. cit.

[19] Communication No. 500/1992, *Joszef Debreczeny v. Netherlands*, Views adopted on 3 April 1995.

[20] General comment No. 25, op. cit., para. 4.

4.23 The State party highlights the particular responsibilities of the President of the Republic of Lithuania, who is expected to set an example. It argues that the author still does not acknowledge the gravity and seriousness of the breaches that he committed, and concludes that the author expects the European Court of Human Rights and the Human Rights Committee to justify the gross violations that he consciously carried out. It considers that the restriction imposed is proportionate with the seriousness of the acts, and is neither discriminatory nor arbitrary.

4.24 As regards the alleged violation of article 25 of the Covenant regarding the author's inability to become a judge, state controller, prime minister or minister, the State party considers that the author has not provided any arguments or evidence. It reiterates the arguments presented as to the inapplicability of article 14 of the Covenant *ratione materiae* and considers that the present communication has nothing to do with the right not to be arbitrarily dismissed from public service.[21] The State party also submits that the author's claims relating to his inability to become a judge or a state controller are merely hypothetical, because he does not meet the specific eligibility requirements for any of those offices. It therefore considers that the author has no actual grievance to claim under article 25 of the Covenant and that his claim is inadmissible under articles 1 and 2 of the Optional Protocol. As to the author's complaint regarding his inability to become a prime minister or minister, the State party considers that the author does not demonstrate that he actually intended to stand for those positions and was prevented from doing so. Accordingly, he cannot claim to be a "victim" within the meaning of article 1 of the Optional Protocol.

Author's comments on the State party's submissions

5.1 On 30 November 2012 and 22 December 2012, the author provided comments on the State party's submissions. The author specifies that he never talked about the possibility of appointing Mr. Borisov as public adviser to the President, but only as a "voluntary (unpaid) adviser", and that the appointment never actually took place.

5.2 With regard to the argument of the State party that the author did not intend to stand for presidential elections or to become a minister during the last eight years, the author considers that his intention to stand for presidential elections or to become a minister would have been rejected in compliance with the very clear ruling of the Constitutional Court of 25 March 2004. Additionally, while the political party led by the author became part of the government coalition after the parliamentary elections of October 2012, the author could not become a minister since the lifelong prohibition was still in force.

5.3 The author maintains that the impeachment proceedings that were applied to his case were criminal, as the sanctions imposed were both deterrent and punitive. He therefore considers that articles 14 and 15 of the Covenant apply, and that the State party failed to present any substantial counterargument in that regard.

5.4 With regard to violation of article 14, paragraph 1, of the Covenant, the author considers that the State party was biased when it tried to justify the Constitutional Court's statement of 5 January 2004, by maintaining that the Constitutional Court had "refrained from political polemics", whereas the Court had actually participated in the related "political polemics" through its statements.

5.5 The author also argues that the State party presents false facts when trying to defend itself, with regard to the meeting between the President of the Constitutional Court and the

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[21] The State party refers to communication No. 1376/2005, *Bandaranayake v. Sri Lanka*, Views adopted on 24 July 2008.

Vice-President of the Seimas, and he considers that the pressure by the Seimas was not on the ordinary courts but on the Constitutional Court.

5.6 The author considers that the lifelong prohibition on standing for election and on being a minister was justified only by a presumption of guilt, in breach of article 14, paragraph 2, of the Covenant. In addition, he considers that the Seimas declaration of 25 March 2004 was made in breach of the presumption of innocence, prior to the Constitutional Court ruling of 31 March 2004. He argues that by voting to approve the declaration, the Seimas intended to punish the author for his political opinion.

5.7 Considering the State party's statement that he could have addressed the Constitutional Court for an interpretation of the sanction while in office, the author comments that he did not do so because the prohibition did not exist at that time. By introducing the sanction in question, the State party breached article 15 of the Covenant. Additionally, the author considers that article 15 was breached by the "conviction" by the Constitutional Court, whereas he was acquitted by the Supreme Court regarding the alleged disclosure of a State secret, whereas the alleged abuse of office resulting in influencing the decisions of the private company Zemaitijos keliai was discontinued, and whereas the investigation into the alleged buying of citizenship by Mr. Borisov was never started. The author considers that his "conviction" results from an obvious error of assessment and constitutes a denial of justice, representing a breach by the Constitutional Court of the principle of *nulla poena sine lege*.

5.8 The author further argues that the State party violated article 25 (b) of the Covenant through the ruling of the Constitutional Court of 5 September 2012, which declared as unconstitutional the March 2012 amendment to the Law on Seimas Elections. The author considers that this decision amounts to a refusal to execute the European Court judgement requiring the re-establishment of the right to stand for parliamentary elections retrospectively.

5.9 With regard to his right to become a minister, state controller or judge, the author argues that he has sufficient university background to become a state controller and that he may acquire the necessary qualification to become a judge.

5.10 Finally, the author considers that "elections" obviously cannot declare a person innocent, and that the State party's statement to the effect is an attempt to mislead the Committee. The author nevertheless considers that both "elections" and "referendums" may lead to an amendment to the Constitution and that the Constitutional Court prohibited referendums to avoid such an amendment.

State party's additional observations

6.1 In its submission dated 15 March 2013, the State party made additional comments in which it maintained its position that the author's complaints regarding the alleged violations of articles 14 (paras. 1 and 2), 15 and 23 (a), (b) and (c) are incompatible with the Covenant and are unsubstantiated.

6.2 The State party reiterates that the aim and purpose of the impeachment proceedings is to protect the state community and that these proceedings are therefore different from criminal proceedings.

6.3 The State party argues that it did not suggest to the author to apply to the Constitutional Court for the setting of a constitutional sanction, but for a revision of the irreversible nature of the constitutional sanction under review.

6.4 The State party considers that the author's statements regarding the alleged influence of the Seimas on the Constitutional Court are grounded in his personal beliefs, as in its decision of 31 March 2004, the Constitutional Court did not refer to the invitation made by the author to Mr. Borisov, nor to the declaration made by the Seimas suggesting that the author resign from office.

6.5 The State party recalls that the special investigation commission concluded that the charges brought against the author were grounds for instituting impeachment proceedings in the Seimas. It emphasizes that the allegation that the author had unlawfully granted Lithuanian citizenship to Mr. Borisov was only one of the grounds for the impeachment.

6.6 With regard to the author's assertion that the text of the Constitution did not include an *expressis verbis* ban on re-election after impeachment, the State party argues that the official constitutional doctrine is part of the Constitution. The author's statement that the judgement of the European Court of Human Rights of 6 January 2011 required the re-establishment of his right to stand for parliamentary elections retrospectively is misleading and incorrect. The Constitutional Court clearly recognized the duty to remove the incompatibility of the provisions of article 3 of Protocol No. 1 of the Convention with the Constitution, and possible constitutional amendments are under review. Finally, the State party emphasizes that the Constitutional Court did not prohibit a referendum in order to prevent amendment of the restriction at issue. The statement of the Court in its ruling of 25 May 2004 is related exclusively to the finality and non-disputability of its conclusion in respect of a concrete person against whom impeachment procedures had been initiated. It does not mean that the constitutional legal regulation governing the impeachment procedure and its consequences may not be changed by way of referendum or ordinary legislative procedure.

Issues and proceedings before the Committee

Consideration of admissibility

7.1 Before considering any claim contained in a communication, the Human Rights Committee must decide, in accordance with rule 93 of its rules of procedure, whether the communication is admissible under the Optional Protocol to the Covenant.

7.2 The Committee has to ascertain, in accordance with article 5, paragraph 2 (a) of the Optional Protocol, whether the same matter is being examined under another procedure of international investigation or settlement. The Committee notes that the European Court of Human Rights on 6 January 2011 (application No. 34932/04) decided that the author's permanent and irreversible disqualification from holding parliamentary office violated his right to stand in parliamentary elections. The author challenges the Constitutional Court's subsequent ruling of 5 September 2012 as a refusal to execute the judgement of the European Court. The Committee notes that, according to article 46, paragraph 2, of the European Convention for the Protection of Human Rights and Fundamental Freedoms, the execution of final judgements of the European Court of Human Rights is supervised by the Committee of Ministers of the Council of Ministers, and considers that this matter is currently being actively examined under another procedure of international investigation or settlement. Accordingly, the Committee considers that the part of the communication which relates to the author's lifelong disqualification from parliamentary office is inadmissible under article 5, paragraph 2 (a), of the Optional Protocol, in the present circumstances.

7.3 The Committee notes, however, that the remainder of the author's claims to the European Court of Human Rights, which related to his disqualification from office other than Parliament, was declared incompatible *ratione materiae* with the European Convention. The Committee recalls that the concept of "the same matter" has to be understood as including the same author, the same facts and the same substantive rights. The Committee notes that article 25, paragraphs (b) and (c), have no equivalent in the European Convention and its Protocols as regards access to public office other than the legislature, and therefore concludes that the communication does not concern the same matter in the sense of article 5, paragraph 2 (a), of the Optional Protocol. The Committee also recalls that when adhering to the Optional Protocol, Lithuania did not enter a reservation to article 5, paragraph 2 (a). Accordingly, the Committee concludes that it is not prevented under article 5, paragraph 2 (a), from considering these claims.

7.4 As regards the alleged prohibition on standing in local elections as a result of the amendments to the Law on Local Self-Government adopted on 15 September 2008, the Committee notes the argument of the State party according to which the amendments do not affect the author's right to stand in local elections, since the oath introduced for new members of the Self-Government Council is different from the constitutional oath that the author is prevented from taking. The Committee considers that the author has not sufficiently substantiated his claims with regard to local elections and declares this claim inadmissible in accordance with article 2 of the Optional Protocol.

7.5 As regards the disqualification from serving as a judge or a state controller, the Committee notes the State party's argument that the author is not affected by this disqualification because he does not satisfy the specific prerequisites for these offices. The Committee notes that the author has not obtained a legal education and has not shown that he has taken any concrete steps to obtain such an education in the future. The Committee concludes that the author has not shown that he could be considered a victim of a violation of the Covenant with regard to the disqualification from these offices. This part of the communication is declared inadmissible in accordance with article 1 of the Optional Protocol.

7.6 The Committee notes the author's argument according to which the impeachment proceedings under review were linked to the alleged criminal offences and were therefore of a criminal nature. The Committee also notes that the author claims a violation of article 14, paragraphs 1 and 2, of the Covenant, resulting from an alleged collusion between the President of the Constitutional Court and the member of the Seimas who had initiated the proceedings against him, and from the pressure exercised on the Constitutional Court. The Committee notes that, under the Lithuanian Constitution, the President is immune from criminal liability but can be removed from office and held constitutionally liable through impeachment proceedings,[22] and that the Seimas is the only authority mandated to decide whether the person against whom the proceedings were initiated should be removed from office.[23]

7.7 The Committee recalls that the right to a fair and public hearing by a competent, independent and impartial tribunal is guaranteed in cases regarding the determination of criminal charges against individuals or of their rights and obligations in a suit at law. It further recalls that there is no determination of rights and obligations in a suit at law where the persons concerned are confronted with measures taken against them in their capacity as persons subordinated to a high degree of administrative or parliamentary control,[24] such as the impeachment procedure. In the case under review, the impeachment procedure was initiated by the Seimas as a parliamentary procedure, independently of the criminal procedures being followed against the author.

7.8 Similarly, the outcome of the impeachment proceedings was not to charge the author with a "criminal offence" and to hold him "guilty of a criminal offence" within the meaning of article 15 of the Covenant. Accordingly, the author's claims under articles 14 and 15 of the Covenant are incompatible *ratione materiae* with the provisions of the Covenant and are inadmissible under article 3 of the Optional Protocol.

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[22] Articles 74 and 86 of the Constitution.

[23] Articles 246 to 258 and 260 of the Statute of the Seimas, and articles 74 and 107 § 3 of the Constitution.

[24] See general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, para. 17; and communication No. 1015/2001, *Perterer v. Austria*, op. cit., para. 9.2 (disciplinary dismissal).

7.9 As regards the alleged violation of article 25, concerning the impeachment procedure and the restrictions adopted, the Committee notes the argument of the State party according to which the author could have applied to the Constitutional Court for an interpretation of its ruling of 11 May 1999, holding that the constitutional sanction imposed in the context of impeachment proceedings was "of an irreversible nature". The Committee also notes the position of the State party that the author could have resigned in order to avoid the impeachment procedure and its outcome. The Committee further notes the argument of the author according to which an application to the Constitutional Court would have been ineffective, as there was no doubt as to the meaning of the phrase "of an irreversible nature", and that under article 107 of the Lithuanian Constitution, the decisions of the Constitutional Court have statutory force and are final. In this respect, the Committee shares the analysis of the European Court of Human Rights according to which a prior request to the Constitutional Court for clarification of whether removal from office entailed lifelong restrictions "could not […] have prompted an examination of the author's particular situation […]. It would also have required him to resign voluntarily as President and thereby to accept such a restrictive condition that the remedy in question could not in any event be regarded as 'accessible'." The Committee therefore considers that the author has exhausted all available domestic remedies with regard to the alleged violations of article 25, and that these claims are admissible. The Committee therefore proceeds to a Consideration of the merits.

Consideration of the merits

8.1 The Human Rights Committee has considered the communication in the light of all the information made available to it by the parties, as provided for under article 5, paragraph 1, of the Optional Protocol.

8.2 Regarding the author's claims under article 25 of the Covenant, the issue before the Committee is whether the lifelong disqualifications adopted against him from being a candidate in presidential elections, or being a prime minister or a minister, amount to a violation of the Covenant.

8.3 The Committee recalls that article 25 of the Covenant recognizes and protects the right of every citizen to take part in the conduct of public affairs, the right to vote and to be elected, and the right to have access to public service. Whatever form of constitution or government is in force, the exercise of these rights by citizens may not be suspended or excluded except on grounds which are established by laws that are objective and reasonable, and that incorporate fair procedures.[25]

8.4 The Committee notes the State party's argument that the constitutional sanction restricting the author's rights is proportionate to the gravity of his unconstitutional conduct. It also notes the author's argument that the lifelong disqualifications adopted against him were not established by law, not objective and not reasonable, and are disproportionate. In this regard, the Committee notes the statements made by the Constitutional Court on 5 January 2004 and on 16 March 2004, insinuating the responsibility of the author prior to the outcome of the proceedings under review. The Committee also notes that on 6 April 2004, when the Seimas decided to remove the author from his office of President, no legal provision expressly stated that he could be barred from standing for election as a result. Accordingly, on 22 April 2004, the Central Electoral Committee authorized the author to stand in the June 2004 presidential election. However, on 4 May 2004, the Seimas introduced an amendment to the Presidential Elections Act stating that anyone who had been removed from office following impeachment proceedings was prevented from standing in presidential elections for a period of five years after those proceedings. Following that amendment, the Central Electoral Committee refused to register the author as a candidate. On 25 May 2004, the Constitutional Court held that such a disqualification was compatible with the Constitution, but that subjecting it to a time limit was unconstitutional, adding that it applied to any office for which it was necessary to take a constitutional oath. On 15 July 2004, the Seimas adopted an amendment to the Elections Act, through which anyone removed from office following impeachment proceedings became ineligible as a Member of Parliament, and could not stand for the offices of President, Prime Minister, Minister, Judge or State Controller. In view of the foregoing, the Committee considers that the lifelong disqualifications on being a candidate in presidential elections, or on being a prime minister or minister, were imposed on the author following a rule-making process that was highly linked in time and substance to the impeachment proceedings initiated against him. Under the specific circumstances of the instant case, the Committee therefore considers that the lifelong disqualifications imposed on the author lacked the necessary foreseeability and objectivity and thus amount to an unreasonable restriction under article 25 (b) and (c) of the Covenant, and that the author's rights under these provisions have been violated.

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[25] See general comment No. 25, op. cit., paras. 3, 4 and 16.

9. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the State party has violated the author's rights under article 25 (b) and (c), of the International Covenant on Civil and Political Rights.

10. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including through revision of the lifelong prohibition of the author's right to be a candidate in presidential elections or to be a prime minister or minister, in light of the State party's obligations under the Covenant. Additionally, the State party is under the obligation to take steps to avoid similar violations in the future.

11. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when it has been determined that a violation has occurred, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views and disseminate them broadly in the official languages of the State party.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Appendix

Individual opinion by Committee member Mr. Gerald L. Neuman (partially dissenting)

I fully agree with the Committee's rulings on admissibility. In particular, it is important for the proper performance of the Committee's functions that litigants who have already prevailed in the European Court of Human Rights not be permitted to bring the same issue as a communication under the Optional Protocol merely to seek a second opinion.[a]

Regarding the merits, I would stress the narrowness of the Committee's holding, which results from the unusual manner in which the author's permanent disqualification from standing for certain offices was enacted. The decision should not be misunderstood as calling into question permanent disqualification of impeached office-holders for future elections based on well-established ground rules. A wide variety of States, for example, provide expressly in their constitutions for ineligibility after impeachment as an authorized or mandatory consequence.[b]

Even though the holding is narrow, I disagree with the Committee's conclusion in paragraph 8.4 of its Views that, under the circumstances, the author's permanent ineligibility to stand again for election to the particular office of President violates article 25 of the Covenant.

Impeachment is an extraordinary means for protecting the democratic political process against an otherwise unremovable president who abuses the powers of the office. Impeachments are rare and difficult. An impeachment is not merely a vote of no confidence that contemplates renewed elections to test the president's popular support. It is both reasonable and foreseeable that a president removed by impeachment could be ineligible ever to stand again for election to that sensitive office.

Permanent ineligibility after impeachment is also not a disproportionate consequence for abuse of the office. This Committee has observed that permanent disqualification of citizens who have been convicted of crimes from participating in the political process as voters may violate article 25.[c] Stricter requirements for candidates who seek to exercise great power over others can still be reasonable and proportionate under article 25. If presidents who have successfully completed one or more terms can be permanently ineligible for re-election for the sake of ensuring a healthy and competitive political system, then surely presidents who have been removed for abusing their office can also be permanently barred.

[Done in English. Subsequently to be issued also in Arabic, Chinese, French, Russian and Spanish as part of the present report.]

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[a] Cf. communication No. 712/1996, *Smirnova v. Russian Federation*, Views adopted on 5 July 2004, paras. 9.3 and 9.4 (finding that the author was no longer a "victim" with regard to an issue on which she had prevailed in the European Court of Human Rights).

[b] See, for example, the constitutions of Angola (art. 65(3)); Argentina (sec. 60); Bangladesh (art. 48(4)); Colombia (art. 175(2)); Madagascar (art. 132); Philippines (art. XI, sec. 3); Slovakia (art. 107); South Africa (art. 89(2)); Timor-Leste (sec. 79); United States of America (art. I, sec. 3).

[c] General comment No. 25, op. cit., para. 14.

PP. Communication No. 2177/2012, *Johnson v. Ghana* (Views adopted on 27 March 2014, 110th session)*

Submitted by:	Dexter Eddie Johnson (represented by The Death Penalty Project)
Alleged victim:	The author
State party:	Ghana
Date of communication:	18 July 2012 (initial submission)
Subject matter:	Mandatory death penalty
Procedural issue:	None
Substantive issues:	Right to life, prohibition of inhuman or degrading treatment or punishment, right to fair trial
Articles of the Covenant:	6, para. 1; 7; and 14, paras. 1 and 5
Article of the Optional Protocol:	2

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 27 March 2014,

Having concluded its consideration of communication No. 2177/2012, submitted to the Human Rights Committee on behalf of Dexter Eddie Johnson under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

Views pursuant to article 5, paragraph 4, of the Optional Protocol

1.1 The author of the communication is Dexter Eddie Johnson, a national of Ghana and the United Kingdom born in 1967. He has been sentenced to the death penalty and claims that if Ghana[1] proceeded with the execution, it would violate his rights under articles 2, paragraph 3; 6, paragraph 1; 7; and 14, paragraphs 1 and 5, of the International Covenant on Civil and Political Rights. He is represented by The Death Penalty Project.

1.2 On 19 July 2012, pursuant to rule 92 of the Committee's rules of procedure, the Committee, acting through its Special Rapporteur on new communications and interim measures, requested the State party to ensure that the death sentence against Dexter Eddie Johnson was not carried out while the communication was being examined by the Committee.

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* The following members of the Committee participated in the examination of the present communication: Mr. Yadh Ben Achour, Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Walter Kälin, Ms. Zonke Zanele Majodina, Mr. Gerald L. Neuman, Mr. Victor Manuel Rodríguez-Rescia, Mr. Fabián Omar Salvioli, Ms. Anja Seibert-Fohr, Mr. Yuval Shany, Mr. Konstantine Vardzelashvili, Ms. Margo Waterval and Mr. Andrei Paul Zlătescu.

In accordance with article 91 of the Committee's rules of procedure, Sir Nigel Rodley, member of the Committee, did not take part in the consideration of the communication.

[1] The Optional Protocol entered into force for Ghana on 7 December 2000.

Facts as submitted by the author

2.1 On 27 May 2004 an American national was murdered near the village of Ningo in the Greater Accra Region in Ghana. The author was accused of committing the crime and brought to trial. He denied the offence. On 18 June 2008 the Fast Track High Court in Accra convicted the author of the murder and sentenced him to death, the only sentence available for the offence of murder under Ghanaian law.

2.2 The author submits that, according to Section 46 of the Criminal and Other Offences Act (1960), "a person who commits murder is liable to suffer death". He adds that whereas the term "liable" is ambiguous, it was construed in Ghanaian courts that the death penalty was mandatory in all cases of murder. He further claims that the right to life is enshrined in article 13, paragraph 1, of the Constitution of Ghana (1992), according to which "no person shall be deprived of his life intentionally except in the exercise of the execution of a sentence of a court in respect of a criminal offence under the laws of Ghana of which he has been convicted". The author further submits that the Criminal and Other Offences Act must be construed to give effect to the fundamental rights provisions in the Constitution, in particular the right to life. Although the Covenant is not incorporated in the domestic law of Ghana, it nonetheless provides persuasive guidance to the interpretation of the right to life provision under article 13, paragraph 1, of the Constitution.

2.3 The author appealed to the Court of Appeal and challenged the conviction and sentence. He claimed that whilst the death penalty per se is authorized under article 13, paragraph 1, of the Constitution, mandatory death sentence, on which the Constitution is silent, is unconstitutional. The author substantiated his claim by arguing that the mandatory death penalty violated the right not to be subjected to inhuman and degrading treatment or punishment; the right not to be subjected to arbitrary deprivation of life; and the right to a fair trial, all of which rights are protected under the Constitution. On 16 July 2009, the Court of Appeal dismissed the appeal both on the conviction and sentence. The Court of Appeal held, inter alia, that it had no jurisdiction to deliberate on the author's challenge to the constitutionality of the mandatory death penalty as this issue had not been raised before the lower Court and was not reflected in the record of proceedings. It further referred to article 13, paragraph 1, of the Constitution on the legality of the death penalty.

2.4 The author appealed to the Supreme Court against the conviction and sentence. On 16 March 2011, the Supreme Court dismissed the appeal against the conviction. With regard to the sentence, it rejected the Court of Appeal's decision on its own lack of jurisdiction to deliberate on the constitutionality of the mandatory death penalty, as matters of law could be raised at any time in the proceedings. Lastly, it rejected the merits of the author's challenge to the constitutionality of the mandatory death penalty, by holding that the mandatory death sentence for murder was consistent with the Constitution. It further added that only the parliament could amend the Criminal and Other Offences Act to incorporate the various degrees of murder and enable trial courts to determine the type of punishment to be imposed on a convicted murderer.

2.5 The author submits that he has exhausted domestic remedies, as there is no right to appeal against the decision of the Supreme Court.

The complaint

3.1 The author claims that a mandatory death penalty for all offences of a particular kind, such as murder, prevents the trial court from considering whether this exceptional form of punishment is appropriate in the circumstances of the case. He thus claims that such an indiscriminate imposition of the death penalty amounts to a violation of his right to life under article 6, paragraph 1, of the Covenant.

3.2 The author submits that the imposition of a mandatory death sentence with no judicial discretion to impose a lesser sentence violates the prohibition of inhuman or degrading treatment or punishment under article 7 of the Covenant. In this respect, the author cites jurisprudence from national courts as well as the judgement of the European Court of Human Rights in *Soering v. United Kingdom.*[2]

3.3 The author also submits that the mandatory imposition of the death penalty in his case violated his right to a fair trial, since part of that right is the right to review of his sentence by a superior court, and his sentence thus amounts to a violation of his rights under article 14, paragraphs 1 and 5, of the Covenant. He explains that such obligatory sentences prevent courts from determining the sentence for the individual concerned. Instead they impose a unique sentence regardless of the specific circumstances of the offence or of the offender. They also prevent any consideration of factual issues at the appeal stage, thereby violating the offender's right to have his sentence reviewed by a higher court.

3.4 Lastly, the author submits that the State party has failed in its obligation under article 2, paragraph 3, of the Covenant to provide an effective remedy to the aforementioned violations of his rights, and requests the Committee to make a finding to that effect.

The State party's observations on admissibility and merits

4.1 The State party submits that it is a de facto abolitionist State, since it has not carried out any death sentences in the past 20 years, and therefore it would be highly unlikely that the death penalty would be carried out in the present case. Furthermore, while reaffirming that the Constitution, which retains the death penalty, is the supreme law in Ghana, the State party submits that constitutional reform is under way in relation to the death penalty.

4.2 The State party submits that international instruments to which it is party, including the Covenant and its Optional Protocol, have not been given effect in its legal system, and thus do not take precedence over national law. It further notes that it has not ratified the Covenant's second Optional Protocol. It adds that the author's challenge to the constitutionality of the mandatory death penalty has been rejected by the highest judicial body in Ghana.

4.3 Whereas article 13, paragraph 1, of the Constitution allows the death penalty for certain serious crimes, which are murder, genocide and treason, such a penalty is not indiscriminately imposed, and the personal circumstances of a person convicted for murder may lead to a reduced sentence. The State party further submits that as a sovereign State, it can and does decide on how to balance competing rights enshrined in its Constitution.

4.4 It adds that in cases of murder, the jury trial assesses the circumstances of the particular case, and must come to a unanimous decision for a conviction to be issued regarding a murder charge. The State party adds that convicted persons may seek pardon from the President, who can commute the death penalty to a lesser sentence.

4.5 As long as the deprivation of life is not arbitrary, international human rights law does not object to the imposition of the death penalty, rather it tries to encourage States to abolish it, and to introduce certain limits as to how such a sentence is imposed. Moreover, the death penalty in Ghana is practised within international limits, as it is permitted only for the aforementioned three serious crimes; pardon can be sought; and some categories of offenders may not be subject to the death penalty. The death penalty is not carried out in the case of defendants who are juveniles, pregnant women or nursing mothers. Moreover, persons with mental disability or illness who would not understand the consequences of their acts, or persons in a "paroxysm of madness" who are incapable of knowing that murder is a crime, are not subject to punishment. Intoxication is also a defence if the individual was involuntarily intoxicated or intoxicated to the point of insanity. The State party thus concludes that the personal circumstances of defendants are taken into account when a death sentence is imposed.

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[2] *Case of Soering v. the United Kingdom* (Application no. 14038/88), judgment of 7 July 1989, para. 104.

4.6 The State party concludes that the death penalty for murder in Ghana takes account of varying degrees of seriousness, as courts are not prevented from considering the basic circumstances of defendants or from individualizing the sentence. Courts do not indiscriminately impose a mandatory death penalty. It thus invites the Committee to find that a mandatory death penalty is not imposed for all offences of a particular kind in Ghana, due to the various categories of persons for which the death penalty cannot be carried out.

4.7 With regard to the author's claim under article 7 of the Covenant, the State party submits that, as there are several categories of person against whom the death penalty cannot be carried out, criminal sentences are individualized to some extent and the imposition of the death penalty is not mandatory in all cases of murder. It adds that the sentence is proportionate to the gravity of the offence, as murder is normally punishable by sentence of death, but that mitigating factors allow the non-application of the death penalty for the crime of murder. Therefore, there is no violation of the prohibition of inhuman or degrading treatment or punishment under article 7 of the Covenant.

4.8 With regard to article 14, paragraphs 1 and 5, of the Covenant, the State party claims that a mandatory imposition of the death penalty for the offence of murder does not violate the author's rights under article 14, paragraphs 1 and 5, as the Supreme Court is empowered to conduct judicial review as well as to rule on the constitutionality of any legislation or executive action. It further endorses the Supreme Court conclusion that Section 46 of the Criminal and Other Offences Act is consistent with the Constitution and thus only the parliament has the power to change the law with regard to the sentence for murder.

4.9 The State party recapitulates by stating that: international law does not prohibit capital punishment; Ghana is not a party to the second Optional Protocol to the Covenant; it has not to date voted in favour of the United Nations moratorium on the death penalty; it asserts its sovereign right to balance competing rights; the death penalty is permitted in its legal system, and since the provision permitting that is consistent with the Constitution, it is the role of the parliament to change the law and not that of the judiciary; the application of the death penalty in Ghana is reserved only for the most serious crimes, in line with article 6, paragraph 2, of the Covenant, and is not automatically applied to defendants; legal safeguards are in place to prevent miscarriages of justice, in particular in connection with criminal charges for which the death penalty may be applied; the death penalty has not been executed in Ghana in the last two decades; and legal reform that, inter alia, aims at abolishing the death penalty in Ghana is under way.

4.10 The State party concludes that, until the Constitution reflects the ultimate shift in its law on the death penalty, the Committee is invited to recognize the supremacy of the Constitution, and not to make any adverse findings against it.

Author's comments on the State party's observations

5.1 The author agrees with the State party's assertions that: the Covenant has not been given effect in the Ghanaian legal system; Ghana is a sovereign State retaining its right to balance competing rights; legal safeguards to prevent miscarriages of justice are in place; and that there are current moves in Ghana to abolish the death penalty. However, the author claims that these assertions have no bearing on the merits of his communication before the Committee.

5.2 The State party erred in its assertion that the crime of murder is normally punishable by the death penalty, as in Ghana the crime of murder is necessarily punishable by the death penalty and courts have no discretion or power to impose a different sentence. In his case, the trial judge pronounced the death sentence immediately after his conviction as the only available sentence for the crime of murder. The death penalty was mandatory, and there was no room for any judicial discretion not to impose the death penalty against him once he had been convicted of murder.

5.3 The author reiterates that there were no mitigating circumstances that the court could have applied in order to change the death sentence. He further quotes the trial judge as stating immediately after his conviction; "the only sentence for the crime you committed is death. You are therefore sentenced accordingly".

5.4 Regarding the State party's claim as to the existence of the clemency provision in its Criminal and Other Offences Act, he submits that this argument has no bearing on his complaint, since such discretionary measures cannot replace judicial review of a criminal case.

5.5 As regards the State party's arguments under article 14 of the Covenant, he comments that, since the Supreme Court has rejected his challenge to the constitutionality of the mandatory death penalty for murder, no court in Ghana has the power to review the sentence in cases where the defendant is convicted of murder.

5.6 Lastly, the author comments on the State party's assertion that it is a de facto abolitionist State. He states that this is a matter of political discretion, and that executions can resume at any time. The Committee is thus invited to afford the author a measure that would stop his execution.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the case is admissible under the Optional Protocol to the Covenant.

6.2 The Committee has ascertained, as required under article 5, paragraph 2 (a), of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement. It also notes that domestic remedies have been exhausted. No challenge from the State party to this conclusion has been received. The requirements of article 5, paragraph 2 (a) and (b), of the Optional Protocol have thus been met.

6.3 The Committee considers that the author's claims under articles 2, paragraph 3; 6, paragraph 1; 7; and 14, paragraphs 1 and 5, have been sufficiently substantiated for the purposes of admissibility. Accordingly, the Committee declares the communication admissible and proceeds to its examination on the merits.

Consideration of the merits

7.1 The Human Rights Committee has considered the present communication in the light of all information made available to it, in accordance with article 5, paragraph 1, of the Optional Protocol.

7.2 The Committee notes the author's claims under article 6, paragraph 1, of the Covenant, that Section 46 of the Criminal and Other Offences Act prescribes the death penalty for the offence of murder as the only penalty, and that the State party's Constitution is silent as to whether the death penalty must be imposed in relation to the offence of murder. The Committee also notes the State party's claims that convicted persons may seek pardon from the President; that Ghana is a de facto abolitionist State; and that some categories of offender are not subject to the death penalty, including pregnant women, nursing mothers, minors and persons with mental disability or illness. While recognizing that the State party is de facto abolitionist, the Committee notes the author's response that the de facto moratorium does not guarantee that a death sentence will not be carried out at a later point. In this connection it recalls the State party's statement that it has thus far not voted in favour of General Assembly resolution 62/149, which calls for a worldwide moratorium on executions.

7.3 The Committee notes that in the case of the author, there was no room for judicial discretion at the first instance or appeal courts so as not to impose the only sentence provided by law, that is, the death penalty, after he had been convicted for murder. The Committee further notes that, while the State party's legislation excludes the imposition of the death penalty for certain categories of persons, the mandatory imposition of the death penalty for any other offender is based solely upon the category of crime for which the offender is found guilty, with no margin for the judge to evaluate the circumstances of the particular offence. In this context, the Committee refers to its jurisprudence to the effect that the automatic and mandatory imposition of the death penalty constitutes an arbitrary deprivation of life, in violation of article 6, paragraph 1, of the Covenant, in circumstances where the death penalty is imposed without regard to the defendant's personal circumstances or the circumstances of the particular offence.[3] The existence of a de facto moratorium on the death penalty is not sufficient to make a mandatory death sentence consistent with the Covenant.[4] Furthermore, the Committee recalls that the existence of a right to seek pardon or commutation, as required under article 6, paragraph 4, of the Covenant, does not secure adequate protection to the right to life, as these discretionary measures by the executive are subject to a wide range of other considerations compared to appropriate judicial review of all aspects of a criminal case.[5] It follows that the automatic imposition of the death penalty in the author's case, by virtue of Section 46 of the Criminal and Other Offences Act, violated the author's rights under article 6, paragraph 1, of the Covenant. The Committee also reminds the State party that by becoming a party to the Covenant it undertook to adopt legislative measures in order to fulfil its legal obligations.[6]

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[3] Inter alia, communications No. 1520/2006, *Mwamba v. Zambia*, Views adopted on 10 March 2010, para. 6.3; No. 1132/2002, *Chisanga v. Zambia*, Views adopted on 18 October 2005, para. 7.4; No. 845/1998, *Kennedy v. Trinidad and Tobago*, Views adopted on 26 March 2002, para. 7.3; and No. 806/1998, *Thompson v. St. Vincent & The Grenadines*, Views adopted on 18 October 2000, para. 8.2.

[4] Communication No. 1406/2005, *Weerawansa v. Sri Lanka*, Views adopted on 17 March 2009, para. 7.2.

[5] Communication No. 806/1998, *Thompson v. St. Vincent & the Grenadines*, Views adopted on 18 October 2000, para. 8.2.

[6] Article 2, paragraph 2, of the Covenant, and general comment No. 31 (2004) on the nature of the general legal obligation on States Parties to the Covenant, *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 40*, vol. I (A/59/40 (Vol. I)), annex III, paras. 7 and 13.

7.4 In the light of the above finding of a violation of article 6, paragraph 1, of the Covenant, the Committee will not address the author's remaining claims under articles 7 and 14, paragraphs 1 and 5.[7]

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it reveal a violation of the author's right under article 6, paragraph 1, of the Covenant.

9. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy, including the commutation of the author's death sentence. The State party is under an obligation to avoid similar violations in the future, including by adjusting its legislation to the provisions of the Covenant.

10. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when a violation has been established, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views and to have them widely disseminated in the State party.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

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[7] Communication No. 1077/2002, *Carpo et al. v. the Philippines*, Views adopted on 28 March 2003, para. 8.4.

QQ. Communication No. 2202/2012, *Castañeda v. Mexico* (Views adopted on 18 July 2013, 108th session)*

Submitted by:	Rafael Rodríguez Castañeda (represented by Graciela Rodríguez Manzo)
Alleged victim:	The author
State party:	Mexico
Date of communication:	25 October 2012 (initial submission)
Subject matter:	Access to the ballot papers used in the presidential election
Procedural issue:	Other procedures of international investigation or settlement
Substantive issues:	Right of access to information
Articles of the Covenant:	Articles 2 (paras. 1, 2 and 3 (a) and (c)), 14 (para. 1) and 19 (para. 2)
Article of the Optional Protocol:	Articles 3 and 5 (para. 2 (a))

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 18 July 2013,

Having concluded its consideration of communication No. 2149/2012, submitted to the Human Rights Committee by Mr Rafael Rodríguez Castañeda under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The author of the communication is Rafael Rodríguez Castañeda, a Mexican national, born on 11 June 1944. The author claims that he is the victim of violations by Mexico of his rights under article 19 (para. 2) and article 2 (paras. 2 and 3 (a) and (b)), read in conjunction with article 14 (para. 1) and article 2 (para. 1), of the Covenant. The author is represented by Ms. Graciela Rodríguez Manzo.

1.2 On 31 October 2012, the Special Rapporteur on new communications and interim measures, acting on behalf of the Human Rights Committee and in accordance with rule 92 of the Committee's rules of procedure, requested the State party to suspend the destruction of the ballot papers used in the election of 2 July 2006 while the Committee considered the communication.

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* The following members of the Committee participated in the examination of the present communication: Mr. Yadh Ben Achour, Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Ahmad Amin Fathalla, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Ms. Zonke Zanele Majodina, Mr. Kheshoe Parsad Matadeen, Mr. Gerald L. Neuman, Sir Nigel Rodley, Mr. Victor Manuel Rodríguez-Rescia, Mr. Fabián Omar Salvioli, Ms. Anja Seibert-Fohr, Mr. Yuval Shany, Mr. Konstantine Vardzelashvili and Ms. Margo Waterval.

The text of two individual opinions (concurring) by Committee members Mr. Neuman and Mr. Shany are appended to the present Views.

1.3 On 14 November 2012, the General Council of the Federal Electoral Institute decided to suspend the destruction of the ballot papers used in the election of 2 July 2006, in compliance with the Committee's request for interim measures.

The facts as submitted by the author

2.1 On 2 July 2006, a presidential election was held in the State party. According to the initial ballot count, the candidate who was ultimately acknowledged as the winner of the election obtained 15,000,284 votes, or 35.89 per cent of the vote, and the runner-up obtained 14,756,350 votes, or 35.31 per cent of the vote. Several political parties challenged the results before the district councils of the Federal Electoral Institute, and a partial recount of the votes was arranged by the specialized agency and court of final appeal for electoral matters, the Electoral Tribunal of the Federal Judiciary, which declared that, according to the definitive results, the top two candidates had obtained 35.89 per cent and 35.33 per cent of the 41,557,430 votes cast in total. The author states that the gap between the two candidates, initially reported at 243,934 votes, narrowed after the recount arranged by the Electoral Tribunal, to 233,831 votes, and the number of spoilt votes also shrank, from 904,604 to 900,373 votes. Despite the recount, one group continued to challenge both the election results and the vote counts due to various things that happened in the hours immediately after the polls closed. The quick-count results, for example, were not made public, and the figures published under the Federal Electoral Institute's preliminary election results programme for the number of votes cast in the presidential and senate elections did not tally.

2.2 It was against this background that, on 28 July 2006, immediately after the Electoral Tribunal had ruled on the validity of the presidential election, the author, who works as a journalist for the magazine *Proceso*, contacted the Liaison Office for Transparency and Access to Information of the Federal Electoral Institute to request access under the Federal Act on Transparency and Access to Public Government Information to all the used, unused and spoilt ballot papers from the polling stations set up for the election of 2 July 2006. He accordingly requested access to the offices of the country's 300 electoral districts so that the ballots cast in the presidential election could be counted again.[1]

2.3 On 1 September 2006, the Executive Directorate for the Organization of Elections informed the Information Committee of the Federal Electoral Institute that the author could not be granted access to the ballot papers because the electoral process was not over and was being reviewed by the Electoral Tribunal. Moreover, pursuant to article 234, paragraph 4, of the Federal Code of Electoral Institutions and Procedures in force at the time, the packets of ballot papers could not be opened unless an order to the contrary was issued by the Electoral Tribunal in accordance with the exceptions set forth in article 247 of the Code, which, like article 234, was a generally applicable government regulation (as established in article 1 of the Code). As to the validity of the presidential election, the Executive Directorate decided that the Federal Electoral Institute did not have the authority to address that part of the author's request since it fell to the Electoral Tribunal to declare the winner of the election and to respond to any challenges to the results.

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[1] The Committee notes that, according to the copy of the request submitted to the Federal Electoral Institute and the author's application for *amparo*, of 18 September 2006, attached by the author to his communication of 28 July 2006, the author filed two additional petitions with the Liaison Office of the Federal Electoral Institute requesting copies of the election-day records and of the final ballot paper accounts issued by the 130,477 polling stations set up around the country for the presidential election, as well as the detailed records of the ballot paper dispatches, the detailed records of the vote-counting sessions, and the records of the vote counts of the country's 300 electoral districts.

2.4 On 5 September 2006, the Information Committee of the Federal Electoral Institute denied the author's request to access the ballot papers. However, to uphold the author's right to access electoral information, it ordered that the various records issued by the Institute in connection with the presidential election of 2006 be made available to him. The Information Committee indicated that it was unable to comply with the author's request because the electoral laws did not provide for general access to ballot papers; on the contrary, pursuant to articles 234 and 254 of the Federal Code of Electoral Institutions and Procedures, the inviolability of the requested electoral documents had to be respected and the documents destroyed once the Electoral Tribunal had dealt with all formal objections filed in relation to the election and had declared the winner. The electoral laws were based on preserving the secrecy of the vote, which meant that access to ballot papers could be arranged only in exceptional cases and only for the authorities of the Electoral Tribunal to allow them to corroborate any objections that might arise. The Information Committee also pointed out that, under the Federal Act on Transparency and Access to Public Government Information and the Federal Electoral Institute's rules of procedure on transparency and access to public information, ballot papers were not public documents, but material expressions of the electoral preference of voters. As far as access to election-day information was concerned, it should be considered sufficient to provide the interested party with access to the official records issued by the authorities of the Federal Electoral Institute when the polls closed. These records indicate, inter alia, the nature of the votes cast in each ballot box and how they add up; they are prepared and signed by the returning officers of the polling stations and endorsed by representatives of the political entities participating in the election.

2.5 On 20 September 2006, the author filed an application for *amparo* with the Fourth Administrative District Court of the Federal District (the Fourth Court) against the ruling of the Executive Directorate for the Organization of Elections of 1 September 2006, the decision of the Information Committee to deny his request to access the ballot papers, and the provisions of article 254, paragraph 2, of the Federal Code of Electoral Institutions and Procedures, according to which the envelopes containing electoral material, including ballot papers, must be destroyed once an election is over. The author claimed that the denial of his request violated his right to information, as set forth, inter alia, in the Constitution of the State party and article 19 of the Covenant. By that right, the general rule should be to publish information held by public bodies and to provide access to that information, subject only to the restrictions established by law, in order to satisfy an overriding public interest in a democratic society. Since they were not explicitly classified as restricted or confidential information, once the election was over, the ballot papers became documents that had not been made public. The author alleged that article 254, paragraph 2, of the Federal Code of Electoral Institutions and Procedures, was unconstitutional and violated the right to information, since the destruction of electoral material made it impossible to exercise the right to seek and receive information held by public bodies, and limiting that right could not be justified for the protection of national security or public order, or of public health or morals, or public peace. Finally, he stated that granting access to the polling station records neither justified the denial of access to the ballot papers nor fully satisfied his right of access to information, since his request referred to different information that would enable him to analyse how accurately the contents of the ballot papers had been recorded in the polling station records and indentify any discrepancies that may have arisen during that process, merely with the intention of ensuring the transparency of public administration and evaluating the performance of the electoral authorities.

2.6 On 21 September 2006, the Fourth Court rejected the author's application for *amparo* on the grounds that he was using it to challenge actions that could not be called into question through *amparo* proceedings but through the procedures for contesting election results established in the electoral laws.

2.7 On 5 October 2006, the author filed an application with the First Collegiate Administrative Court of the First Circuit (the First Collegiate Court) for the Fourth Court's decision to be subjected to a judicial review, claiming that the aim of his request was not to challenge any of the Federal Electoral Institute's resolutions or decisions on electoral matters, but to protect his fundamental right of access to information held by the State.

2.8 On 31 October 2006, the First Collegiate Court asked the Supreme Court of Justice to consider the application for judicial review filed by the author, which the Supreme Court agreed to do.

2.9 On 11 March 2008, the Supreme Court rejected the author's *amparo* application and confirmed the Fourth Court's decision that it was inadmissible. The Supreme Court ruled that article 254 of the Federal Code of Electoral Institutions and Procedures, on which the Federal Electoral Institute's decision to deny the author's request to access the ballot papers was based, was an electoral regulation since its purpose was to regulate an aspect of electoral procedure. Specifically, the article established what was to be done with the envelopes containing the used, unused and spoilt ballot papers, namely that they should be destroyed after the corresponding election. The application of the regulation that denied access to the envelopes containing the ballot papers was, by the same measure, an electoral matter. The author's request was therefore inadmissible, since regulations, acts and resolutions that were essentially electoral in nature could not be subject to *amparo* procedures.

2.10 On 24 April 2008, the author submitted a complaint and a request for precautionary measures to the Inter-American Commission on Human Rights, alleging a violation of his rights, under the American Convention on Human Rights (Pact of San José, Costa Rica), of access to information (arts. 13.1 and 13.2) and to an effective remedy (art. 25.1), both in conjunction with his right to judicial guarantees (art. 8.1) and the general obligations (arts. 1.1 and 2) established in the Convention. On 2 July 2008, the Commission asked the State party to adopt urgent measures to suspend the destruction of the ballot papers used in the presidential election of 2 July 2006.

2.11 On 2 November 2011, the Commission declared the author's complaint to be inadmissible for failing to present facts that might constitute a violation of the rights guaranteed by the Pact of San José, Costa Rica. The Commission found that the ballot paper accounts drawn up at each polling station, which had been made available to the author, systematically reflected the information contained in the ballot papers. Since, according to its jurisprudence, access to information covered both access to processed data and access to raw data, the Commission concluded that the information made available by the State party satisfied or could have satisfied the author's need for access to information and that the author had not provided any explanation of why that information would not have served his purpose.

2.12 On 3 October 2012, the General Council of the Federal Electoral Institute issued General Decision No. CG 660/2012 authorizing the ballot papers used in the 2006 presidential election to be destroyed between 12 and 26 November 2012.

2.13 The author claims that all effective domestic remedies were exhausted after the Supreme Court's ruling on the matter on 11 March 2008. Also, although he had previously submitted a complaint to the Inter-American Commission on Human Rights, no complaint was being examined under another procedure of international investigation or settlement when he submitted his communication to the Human Rights Committee. In that regard, the author claims that although the Spanish version of article 5, paragraph 2 (a), of the Optional Protocol differs from the other language versions in that it establishes that the Committee shall not consider any communication from an individual unless it has ascertained that (…) the same matter "has not been examined" ("*no ha sido sometido*" in the Spanish) under another procedure of international investigation or settlement, the subparagraph has to be aligned with the English version, since that is the prevalent interpretation in the Committee's jurisprudence and the one that is most favourable to the person. In other words, the subparagraph must be understood as meaning that the Committee "shall not consider any communication from an individual unless it has ascertained that the same matter *is not being examined* under another procedure of international investigation or settlement". Moreover the Commission did not examine the merits of his complaint since it was declared inadmissible under article 47, paragraph (b), of the American Convention on Human Rights on the grounds that "there was no prima facie evidence of a violation of the rights protected by the Convention". The communication therefore meets the admissibility criteria established in article 5, paragraphs 2 (a) and (b), of the Optional Protocol.

The complaint

3.1 The author claims to be the victim of violations by the State party of his rights under article 19 (para. 2) and article 2 (paras. 2 and 3 (a) and (b)), read in conjunction with article 14 (para. 1) and article 2 (para. 1) of the Covenant.

3.2 In relation to the alleged violation of article 19, paragraph 2, the author contends that the Federal Electoral Institute's denial of his request to access, once the election was over, the used, unused and spoilt ballot papers from all the polling stations set up for the 2006 presidential election violated his right to seek, receive and impart information. He was thus denied the right to learn what had happened in that election and hence his right to question, investigate and consider whether public functions were being performed adequately by the Federal Electoral Institute. As a general rule, all information in the possession of any State body is public information, and access to it may only be restricted temporarily and on an exceptional basis. The State party is thus obliged to provide information that is of public interest regarding any of its activities, unless the restrictions permitted by the Covenant have been applied.

3.3 The Federal Electoral Institute's denial of his request constituted an excessive restriction of his right of access to the information held by the State without there being reasonable or sufficiently serious grounds for imposing that restriction, given that the purpose of his request did not pose a threat to national security, public order or the rights of third parties. The State party cannot, therefore, invoke any of the grounds set forth in article 19, paragraph 3, of the Covenant to justify that decision. Restrictions must have a legitimate purpose and must be necessary in a democratic society, that is, they must be geared towards serving the public interest. Any restrictions imposed must, consequently, be proportional to the interest that justifies them, further the legitimate purpose for which they are imposed and infringe as little as possible on the effective exercise of human rights.

3.4 The decision of the Supreme Court of Justice that rejected the author's appeal and upheld the ruling of the Fourth Court constituted a violation of the right to an effective remedy, established in article 2, paragraphs 3 (a) and (b), read in conjunction with article 14, paragraph 1, of the Covenant, since it arbitrarily denied the author legal protection of his rights and prevented his case from being heard with all due judicial guarantees. The Supreme Court violated the principle of legality in departing from its own precedents and declaring the subject of the author's request to be an electoral matter. The provision regulating the destruction of the ballot papers used in the presidential election, set forth in article 254 of the Federal Code of Electoral Institutions and Procedures, should not be considered an electoral regulation since, pursuant to article 170 of that same Code, the electoral process ended the moment the Electoral Tribunal declared the election valid and announced the winner. Moreover, in an *amparo* procedure, the strictest interpretation must be applied when determining what is to be understood as an essentially electoral matter.

3.5 The author maintains that filing the *amparo* application was the only appropriate way to defend his right of access to information. Under the legislation in force at the time, filing an appeal for transparency with the Federal Electoral Institute, through which he could try to have the decision denying him access to the ballot papers overturned, was neither an adequate nor an effective remedy since it would not allow him to challenge the constitutionality of article 254 of the Federal Code of Electoral Institutions and Procedures. The procedure established for defending electoral-political rights through the judicial authorities for electoral matters would also be inadequate in his case because the request for information he had filed with the Federal Electoral Institute did not pursue any electoral purpose and the procedure would not allow him to request the suspension of the destruction of the ballot papers either.

3.6 As to article 2, paragraph 2, of the Covenant, the author alleges that the State party failed to adopt timely measures to bring its national legislation into line with the Covenant and give effect to the rights recognized therein. Article 302 of the new Federal Code of Electoral Institutions and Procedures of 2008 in fact retains the provision ordering the destruction of ballot papers once an election is over instead of ordering that they be preserved in archives that are accessible to all interested persons to protect the right of access to public information.

State party's observations on admissibility and the merits

4.1 On 12 November 2012, the State party submitted its observations on the admissibility and merits of the communication and requested that the Committee declare the communication inadmissible under article 5, paragraph 2 (a), or else under article 3, of the Optional Protocol. The State party adds that the submission of its observations should not be understood or interpreted in any way as acceptance of the Committee's competence to rule on the admissibility or merits of the communication.

4.2 The State party argues that the communication is inadmissible under article 5, paragraph 2 (a), of the Optional Protocol since the same matter has been submitted by the author for examination under another procedure of international investigation or settlement, namely that of the Inter-American Commission on Human Rights. The Commission is an international, public, quasi-judicial, independent body that meets the criteria for classification as a procedure of international investigation or settlement, as referred to in article 5, paragraph 2 (a), of the Optional Protocol.

4.3 Although the Committee has acknowledged the existence of discrepancies between the English, French and Spanish versions of article 5, paragraph 2 (a), of the Optional Protocol,[2] the Protocol does not establish any hierarchy, preference or priorities among the versions since, according to article 14, paragraph 1, all the texts are equally authentic. Pursuant to the 1969 Vienna Convention on the Law of Treaties, a text must be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. Furthermore, according to article 33, paragraph 3, of the Convention, the authentic Spanish version and its contents are presumed to have the same meaning as the other language versions. In this context, since Spanish is the official language of the State party, the State party's accession to the Protocol was based on the Spanish text and the State party assumed its obligations under the Protocol in accordance with the wording of that text. The State party is therefore in no way bound by the authentic texts of the Protocol that exist in other languages.

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[2] The author refers to communication No. 986/2001, *Semey v. Spain*, Views adopted on 30 July 2003.

4.4 The author's claim that the Spanish version of the Protocol has been aligned with the English version has no legal basis in the law of treaties. The State party submits that, moreover, the interpretation given by the Committee to the Spanish text of article 5, paragraph 2 (a), of the Optional Protocol during its fourth session, when it decided that the term "*sometido*" in the Spanish version should be interpreted in the light of the other versions, i.e. that it should be understood as meaning "is being examined" by another procedure of international investigation or settlement,[3] was a unilateral decision that was in no way binding on the States parties to the Optional Protocol. Furthermore, this matter has not been addressed in the meetings of the State parties or on any other occasion in such a way that would make it possible to suppose or infer that the States parties, directly or indirectly, agree with or assent to the interpretation decided on by the Committee. Therefore, the authentic Spanish text is the valid version of the Optional Protocol for the State party and for all the States that ratified it in Spanish.

4.5 When it acceded to the Optional Protocol, the State party did not enter a reservation to article 5, paragraph 2 (a), to deny the Committee jurisdiction when a matter has been submitted to another procedure of international investigation or settlement, since its accession was based on the Spanish version of the text, whose terms it accepted and by whose terms it agreed to be bound. It would have been absurd to formulate a reservation to ensure that what was already clearly established in the text of the Protocol was understood.

4.6 The State party disputes the author's allegation that the most favourable provision must be applied since what is under discussion is not the application of two different provisions but whether the equally authentic Spanish text of an international treaty must be applied. The State party also points out that the decision of the Inter-American Commission on Human Rights to reject the author's complaint was based on an examination not only of procedural matters, but also of the merits of the complaint, and that the Commission found no evidence of a violation of the author's human rights.

4.7 In relation to the merits of the communication, the State party points out that the complaint filed by the author with the Commission referred to the same facts and legal issues that he now brings before the Committee. The Commission assessed the merits of his allegations regarding the right to information and concluded that the information contained in the polling station records of the 2006 election that were made available to the author satisfied his right of access to information. The State party reiterates the arguments it presented to the Commission at the time, especially the argument that the right of access to information of the author and of citizens in general in the 2006 election was guaranteed through the electoral results information system. The contents of the ballot papers were reflected in the ballot paper accounts that present the outcome of the vote, as recorded by randomly selected citizens. All the polling station records of the 2006 election, as well as the district vote counts, are public and accessible. These records reflect the will of the voters inasmuch as they record the number of votes cast for each candidate, the number of spoilt ballot papers and the number of unused ballot papers. Moreover, the scrutiny of the ballot papers is carried out in the presence of representatives of the political parties and, in some cases, election observers.

4.8 The public dissemination and transparency of election results is guaranteed by the relevant provisions of the Federal Code of Electoral Institutions and Procedures. The public has access to the election results even before the definitive results have been computed. Once the scrutiny and counting of votes has been completed, the election results are published in notices, which are displayed in the offices of the returning officers and local and district councils. The results are also recorded in the ballot paper accounts.

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[3] *Official Records of the General Assembly, Thirty-fourth Session, Supplement No. 40* (A/34/40), 1979, para. 584 (see CCPR/C/SR.88 of 24 July 1978).

4.9 The ballot papers themselves are not made available to the public, and the Federal Code of Electoral Institutions and Procedures stipulates that they must be destroyed once the electoral process has concluded. The election laws of other States in the region also establish specific procedures for destroying ballot papers. The destruction of ballot papers cannot be considered an infringement on the right of access to information: it is a rational measure that reflects the definitive nature of elections and eliminates the costs of handling and storing ballot papers.

4.10 Although neither the Optional Protocol nor the Covenant establish time limits for the submission of communications, the submission of this case six years after the last domestic remedy was exhausted, without any explanation for the delay, constitutes an abuse of the right of submission and grounds for declaring the communication inadmissible under article 3 of the Optional Protocol. Moreover, considering that the right that the author alleges has been violated is essentially identical under the American Convention on Human Rights and the Covenant, it is clear that the submission of the communication to the Committee was made not to seek the application of a provision that afforded greater protection, but to have the Committee serve as a review body for a substantive decision taken in the inter-American human rights system. The aim of the Optional Protocol, however, is not to convert the Committee into a review body for other procedures of international investigation or settlement. Nor is it to duplicate procedures by examining a case on the basis of provisions whose content is essentially identical.

4.11 As to the Committee's request for interim measures, transmitted to the State party on 31 October 2012, the State party submits that the Committee exceeded its authority in making such a request, first, because the case before the Committee did not involve a threat to a person's life, physical integrity or security and, second, because the Committee did not indicate the objective parameters or criteria on the basis of which it was able to conclude that irreparable harm to the author's right was imminent, let alone provide evidence of the existence of a serious or urgent situation.

Author's comments on the State party's observations on admissibility

5.1 On 21 January 2013, the author submitted comments on the State party's observations. With regard to the admissibility of the communication, it would seem the State party does not consider there to be other grounds for declaring the matter inadmissible than those invoked under article 3 and article 5, paragraph 2 (a), of the Optional Protocol.

5.2 In relation to article 5, paragraph 2 (a), of the Optional Protocol, the author submits that the State party's arguments on the scope and interpretation of the authentic Spanish text are not supported by the Vienna Convention on the Law of Treaties. The State party cites article 33 of the Convention but does not seem to accept that, when the text of a treaty is authentic in several language versions, all of them are presumed to have the same meaning unless a difference arises that cannot be resolved in accordance with articles 31 and 39 of the Convention.

5.3 The discrepancies between the authentic texts, including the Spanish one, must be resolved by reconciling the texts in accordance with the object and purpose of the Covenant and the Optional Protocol, and in the light of the principle of good faith, the need to serve a useful purpose and the *pro persona* principle. Although the Optional Protocol establishes a procedure that in itself is a means, albeit one among many, for ensuring that persons have an effective remedy for claiming their rights, these discrepancies must be resolved in a way that favours the admissibility of communications related to the protection of persons and their rights.

5.4 The author claims that his position with regard to article 5, paragraph 2 (a), of the Optional Protocol is in keeping with the prevailing interpretation of that provision, i.e., that it may only be cited as grounds for declaring a communication inadmissible when the matter is being examined under another procedure of international investigation or settlement, unless a declaration or reservation stating otherwise is made at the appropriate time. Several States parties from other regions, for example, including two whose official language is Spanish, have made such reservations or declarations in relation to the provision in question.

5.5 Subsequent practice in the implementation of the Optional Protocol confirms the interpretation outlined above, particularly the acceptance of the Committee's jurisprudence regarding communications on matters previously considered by another international body and the acceptance of rule 96 (e) of the Committee's rules of procedure. It is up to the Committee to determine its own jurisdiction.

5.6 With regard to the State party's observations in relation to article 3 of the Optional Protocol, the author contends that, as far as the admissibility of a communication is concerned, whether the matter has been previously submitted to another international procedure is irrelevant since the Committee has the authority to consider such cases according to its own rules on jurisdiction. Also, the submission of the communication does not constitute an abuse of a right under rule 96, paragraph (c), of the Committee's rules of procedure, since the domestic remedies were not exhausted until 11 March 2008, when the Supreme Court of Justice declared the application for *amparo* to be inadmissible. Furthermore, the international procedure undertaken with the Inter-American Commission on Human Rights ended only on 2 November 2011.

5.7 The State party argues that the communication is inadmissible under article 3 of the Optional Protocol because it has been previously examined by another procedure of international investigation or settlement under substantially identical provisions, but that is not a reason established in the Optional Protocol for declaring a communication inadmissible. The similarity between the rights contained in different international human rights treaties cannot prevent alleged victims of rights violations from seeking reparation. On the contrary, according to the *pro persona* principle, no provision of an international human rights treaty may be used as a pretext for limiting access to higher standards of protection in other forums, which includes the procedures put in place to safeguard those rights.

5.8 The Commission did not rule on the merits of the author's complaint, but merely performed a basic analysis to conclude that it was inadmissible, without prejudging its merits.

5.9 As to the merits of the communication, the author reiterates his allegations and submits that these have not been refuted by the State party.

5.10 The distinction drawn between raw and processed data by the Commission in its consideration of the alleged violation of the right of access to information is irrelevant since article 6, paragraph A, section I, of the Constitution of the State party states that all information in the possession of any public body is, as a general rule, to be considered public information, without drawing a distinction between information comprising raw data and that comprising processed data.

5.11 Furthermore, the author cannot be required to provide evidence to demonstrate why access to the processed information presented in the voting records was insufficient or of no use, since, pursuant to article 6, paragraph A, section III, of the Constitution, there is no need for those who request access to public information to explain their interest or justify the use they intend to make of the information.

5.12 It is pointless to speculate whether access to the polling station records or the election results would or might satisfy the author's right of access to the information he requested out of his professional interest as a journalist, since those results and the requested ballot papers are different documents. Such a position is particularly untenable if based on the supposed risk that the raw information might be altered, as was argued by the Commission. The destruction of the ballot papers constitutes an infringement of the right of access to information established in article 19, paragraph 2, of the Covenant. According to the Committee's general comment No. 34 on freedoms of opinion and expression (article 19 of the Covenant) (CCPR/C/GC/34), the right of access to information covers all documentation regardless of the form in which the information is stored, its source and the date of production. Moreover, the State party's own Constitution acknowledges that the duty to preserve documentation held by public bodies is a cornerstone of that right, regardless of whether raw or processed data are involved.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claim contained in a communication, the Human Rights Committee must decide, in accordance with rule 93 of its rules of procedure, whether the communication is admissible under the Optional Protocol to the Covenant.

6.2 The Committee takes note of the arguments put forward by the State party that the communication is inadmissible under article 5, paragraph 2 (a), of the Optional Protocol, given that the same matter was submitted by the author to the Inter-American Commission on Human Rights, which declared it inadmissible since it contained no prima facie evidence of a violation of rights protected by the American Convention on Human Rights.

6.3 The Committee considers that the Spanish version of article 5, paragraph 2 (a), of the Optional Protocol, which states that the Committee shall not consider any communication from an individual unless it has ascertained that the same matter "has not been examined already" ("*no ha sido sometido ya*" in the Spanish) under another procedure of international investigation or settlement, can result in the Spanish version of this paragraph being interpreted differently from the other language versions.[4] The Committee considers that this difference must be resolved in accordance with article 33, paragraph 4, of the 1969 Vienna Convention on the Law of Treaties by adopting the meaning which best reconciles the authentic texts, having regard to the object and purpose of the treaty. The Committee recalls its jurisprudence, which states that the phrase *ha sido sometido* in the Spanish version must be interpreted in the light of the other versions, i.e. understood as meaning "is being examined" under another procedure of international investigation or settlement.[5] The Committee considers that this interpretation reconciles the meaning of article 5, paragraph 2 (a), of the authentic texts referred to in article 14, paragraph 1, of the Optional Protocol. The Committee therefore finds that there is no obstacle to the admissibility of the communication under article 5, paragraph 2 (a), of the Optional Protocol.

6.4 With regard to the requirement to exhaust domestic remedies, the Committee takes note of the author's claim that, when the Supreme Court's ruling of 11 March 2008 declared his application for *amparo* inadmissible, all domestic remedies were exhausted. In the absence of any observations by the State party on this subject, the Committee finds that there is no obstacle to the admissibility of the communication under article 5, paragraph 2 (b), of the Optional Protocol.

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[4] The authentic English text states: "The same matter is not being examined under another procedure of international investigation or settlement"; the authentic French text states: "La même question n'est pas déjà en cours d'examen devant une autre instance internationale d'enquête ou de règlement"; and the authentic Russian text states: "этот же вопрос не рассматривается в соответствии с другой процедурой международного разбирательства или урегулирования".

[5] Communication No. 986/2001, *Semey v. Spain*, Views adopted on 30 July 2003, para. 8.3.

6.5 The Committee takes note of the State party's arguments that the communication must be declared inadmissible under article 3 of the Optional Protocol because it constitutes an abuse of the right to submit a communication inasmuch as it was submitted six years after the last domestic remedy had been exhausted and because it seeks to establish the Committee as a review body for a decision handed down by the Inter-American Commission on Human Rights. The Committee notes that the Commission declared the author's complaint inadmissible on 2 November 2011 and that the author subsequently submitted his communication to the Committee on 25 October 2012. Consequently, since the communication was submitted within three years of the conclusion of another procedure of international investigation or settlement, the Committee considers that, pursuant to rule 96 (c) of its rules of procedure, the timing of the submission of the communication in relation to the exhaustion of domestic remedies and to the decision of another international body does not constitute an abuse of the right to submit communications.

6.6 The Committee takes note of the author's claim that the Federal Electoral Institute's denial of his request to access the used, unused and spoilt ballot papers from all the polling stations established for the 2006 presidential election, together with the legal provisions that require the destruction of ballot papers once the election process is over, violate his right of access to information under article 19, paragraph 2, of the Covenant; that the denial of his request is not justified under article 19, paragraph 3, of the Covenant; and that, contrary to the State party's assertion, access to the polling station records was no substitute for access to the information requested. The Committee considers that, for the purpose of admissibility, the author has sufficiently substantiated his claim under article 19 of the Covenant.

6.7 As regards the author's claim under article 2, paragraphs 3 (a) and (b), read in conjunction with article 14, paragraph1, the Committee takes note of his allegations that the decision of the Supreme Court of Justice that rejected the author's appeal constituted a violation of the right to an effective remedy. The Committee considers that this claim has been insufficiently substantiated for purposes of admissibility and declares it inadmissible under article 2 of the Optional Protocol.

6.8 The Committee also takes note of the author's allegation under article 2, paragraph 2, that the State party failed to adopt timely measures to bring its national legislation concerning the destruction of ballots papers once an election is over instead of ordering that they be preserved in archives that are accessible to all interested persons to protect the right of access to public information. The Committee recalls its jurisprudence in this connection, which indicates that the provisions of article 2 of the Covenant, which lay down general obligations for States parties, cannot, in and of themselves, give rise to a claim in a communication under the Optional Protocol.[6] The Committee therefore considers that the author's contentions in this regard are inadmissible under article 2 of the Optional Protocol.

Consideration of the merits

7.1 The Human Rights Committee has considered the communication in the light of all the information made available to it by the parties, as provided under article 5, paragraph 1, of the Optional Protocol.

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[6] See communications No. 1834/2008, *A.P. v. Ukraine*, decision adopted on 23 July 2012, para. 8.5, and No. 1887/2009, *Juan Peirano Basso v. Uruguay*, Views adopted on 19 October 2010, para. 9.4.

7.2 The Committee takes note of the State party's arguments that the author's right of access to information was guaranteed by placing at his disposal the ballot paper accounts; that all these records reflect the will of the voters; that the public dissemination and transparency of election results is guaranteed by the relevant provisions of the Federal Code of Electoral Institutions and Procedures as once the scrutiny and counting of votes has been completed, the election results are published in notices and also recorded in the ballot paper accounts. However, the State party indicates that the ballot papers themselves are not made available to the public; that by law they must be destroyed once the electoral process has concluded; that the destruction of ballot papers cannot be considered an infringement on the right of access to information; and that it is a rational measure that reflects the definitive nature of elections and eliminates the costs of handling and storing ballot papers.

7.3 The Committee also notes the author's claim that his right to seek information enshrined in article 19, paragraph 2 of the Covenant was violated by the State party as the denial to access to the used, unused and spoilt ballot papers from all the polling stations set up for the 2006 presidential election constituted an excessive restriction of this right by the State party without there being reasonable or sufficiently serious grounds for imposing that restriction, given that all information in the possession of any State body is public information, and access to it may only be restricted temporarily and on an exceptional basis. In his case, the purpose of his request did not pose a threat to national security, public order or the rights of third parties. Therefore, it could not be restricted under article 19, paragraph 3, of the Covenant. Further, the author holds that there is no need for those who request access to public information to explain their interest or justify the use they intend to make of the information.

7.4 The Committee recalls that the right of access to information held by public bodies includes records held by a public body, regardless of the form in which the information is stored, its source and the date of production (CCPR/C/GC/34, para. 18), and that States parties must make every effort to ensure easy, prompt, effective and practical access to such information (ibid., para. 19).

7.5 The Committee refers to its jurisprudence that any restriction on the right to freedom of expression must cumulatively meet the following conditions set out in article 19, paragraph 3, of the Covenant: it must be provided for by law, it must serve one of the aims enumerated in article 19, paragraph 3 (a) and (b), and it must be necessary to achieve one of these purposes.[7]

7.6 The Committee observes the author claims that he requested access to the ballot papers to analyse how accurately their contents had been recorded in the polling station records and to identify any discrepancies that may have arisen during that process, merely with the intention of ensuring the transparency of public administration and evaluating the performance of the electoral authorities. The Committee also notes that the Information Committee of the Federal Electoral Institute rejected the author's request to access the ballot papers. The Institute did, however, place at his disposal the ballot paper accounts drawn up by randomly selected citizens at each polling station of the country's 300 electoral districts. According to the national legislation, those accounts list the number of votes cast for each candidate, the number of spoilt ballot papers and the number of unused ballot papers. By law, votes are scrutinized in the presence of representatives of the political parties, as well as by accredited election observers in some cases, and the results returned by each polling station may be challenged and submitted for review by higher authorities, as indeed occurred in the 2006 presidential election when the initial results were partially reviewed by the Electoral Tribunal.

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[7] Communication No. 1128/2002, *Marques de Morais v. Angola*, Views adopted on 29 March 2005, para. 6.8.

7.7 Given the existence of a legal mechanism for verifying the vote count, which was used in the election in question; the fact that the author was provided with the ballot paper accounts drawn up by randomly selected citizens at each polling station of the country's 300 electoral districts; the nature of the information and the need to preserve its integrity; and of the complexity of providing access to the information requested by the author, the Committee finds that the denial of access to the requested information, in the form of physical ballot papers, was intended to guarantee the integrity of the electoral process in a democratic society. This measure was a proportionate restriction by the State party necessary for the protection of public order in accordance with the law and to give effect to electors' rights, as set forth in article 25 of the Covenant. In the circumstances, the Committee therefore considers that the facts before it do not reveal a violation of article 19, paragraph 2, of the Covenant.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it do not reveal a breach of any provision of the Covenant.

[Adopted in English, French and Spanish, the Spanish text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

Appendices

I. Individual opinion by Committee member Mr. Gerald L. Neuman (concurring)

I fully concur with the Committee's Views on this communication. I write separately to add a few observations about how, in my opinion, the Committee's analysis sheds light on the right of access to information held by government.

The central paradigm of the right to freedom of expression under article 19, paragraph 2, of the Covenant is the right of communication between a willing speaker and a willing listener. The Committee further interprets article 19, paragraph 2, in the light of article 25, as embracing an auxiliary right of access to information held by public bodies that would prefer not to disclose it (see CCPR/C/GC/34, paragraph 18). This right is not derived from a simple application of the words "right … to receive information" in article 19, paragraph 2, which articulate the more highly protected right to receive voluntary communications.[a]

The Committee's present Views refer, among other factors, to the complexity of arranging access to the voluminous information that the author requested, and the problems of integrity raised by the author's request for originals rather than copies. Such factors are often relevant to the reasonableness and proportionality of limitations on access to information.

In the circumstances of the present case, another important factor concerns the integrity of the electoral process and the confusion that would result if every citizen were entitled to conduct a private recount. Taken with other factors, these considerations outweigh the author's right of access. But the Committee is certainly not saying that article 19 would permit a State party to censor criticism of the conduct of an election, based on information that had already been released.

[Done in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]

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[a] See communication No. 1470/2006, *Toktakunov v. Kyrgyzstan*, Views adopted on 28 March 2011 (individual opinion by Committee member Mr. Gerald L. Neuman (concurring)).

II. Individual opinion by Committee member Mr. Yuval Shany (concurring)

1. I concur with the Committee that, under the circumstances of the case, denial by the State party of the author's request to access all of the election ballot papers did not violate the Covenant in view of the exceptionally broad nature of the request, on the one hand, and I share the real concerns that accommodating such a request might impose an excessively heavy burden on the State and complicate its ability to finalizing the election results.

2. I am concerned, however, about the language used in paragraph 7.7 of the Committee's Views, which appears to attribute weight to "the existence of a legal mechanism for verifying the vote count, which was used in the election in question" in reaching the conclusion that no violation of the Covenant has occurred. This may suggest, erroneously to my mind, that the freedom to seek and receive publicly available information generally depends on an individual's ability to prove the social benefits of his exercise of freedom, or that this freedom does not apply to election-related information held by public authorities if other election-monitoring mechanisms are available.

3. Article 19, paragraph 2, of the Covenant protects the "freedom to seek, receive and impart information and ideas of all kinds". According to the Committee's general comment No. 34 on freedoms of opinion and expression (article 19 of the Covenant), such information comprises "records held by a public body, regardless of the form in which the information is stored" (CCPR/C/GC/34, para. 18). There is no reason to doubt that ballot papers are generally covered by article 19, paragraph 2. Ballot papers constitute a particular form of record held by a public body, which contains important information on the voting preferences of the electorate. In conjunction with the ballot paper accounts and the results returned from the polling stations, access to the information derived from the ballot papers would have allowed the author to evaluate the actions of the Mexican federal election bodies (whose operation supports the implementation of article 25 of the Covenant).

4. The author's request to obtain the ballot papers is thus consistent with his freedom to seek and receive information under article 19, paragraph 2, of the Covenant and, like other ways of exercising freedom of expression, it does not need to be prima facie justified or motivated in order to be exercised (subject to possible limitations under article 19, paragraph 3). Furthermore, it appears that in the circumstances of the case, the information sought by the author could have provided him with socially valuable information about the actions of the federal election authorities and of the various guarantees of impartiality they offered. Thus, freedom to seek and impart information about election results is generally protected under article 19 of the Covenant; moreover, given the importance of fostering an informed public debate about the mechanisms through which elections are conducted and monitored, the author's freedom to access the ballot papers should have received a high degree of protection from the State party.

5. Nevertheless, like other Covenant rights, the freedom to seek and receive information pursuant to article 19, paragraph 2, is not absolute, even when it seeks to promote important public interests. Indeed, it may be subject, pursuant to article 19, paragraph 3, to restrictions provided by law and necessary: (a) for respect of the rights or reputation of others; (b) for the protection of national security, public order (*ordre public*), or public health or morals. Such restrictions may include the imposition of fees, which do not constitute an unreasonable impediment to access to information (see CCPR/C/GC/34, in particular paragraph 19), and must always be necessary and proportionate in nature.[a]

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[a] See communication No. 633/95, *Gauthier v. Canada*, para. 13.6.

6. In the circumstances of the case, I agree with the rest of the Committee that the sweeping nature of the author's request to review all the ballot papers makes it exceptionally difficult for the State party to accommodate it in a logistically feasible way that would protect the confidentiality of the election. The serious practical problems associated with the need to provide access to ballot papers in a way that would not harm the integrity of the process (e.g. under State supervision) and the legitimate interest of the State party in finalizing the election results within a relatively short period of time after the election, render the restriction of the author's freedom to access all of the ballot papers reasonable and proportionate, and thus compatible with the public order exception specified in article 19, paragraph 3. As a result, I am also of the view that no violation of article 19 of the Covenant has occurred in the circumstances of the present case.

[Done in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the present report.]